TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 723

THE UNITED STATES OF AMERICA, APPELLANT

vs.

THE MASONITE CORPORATION, CELOTEX CORPORATION, CERTAIN-TEED PRODUCTS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED OCTOBER 30, 1941

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8 In District Court of the United States for the Southern District of New York

CIVIL ACTION No. 7-498

UNITED STATES OF AMERICA, PLAINTIFF

v.

MASONITE CORPORATION, CELOTEX CORPORATION, CERTAINTEED PRODUCTS CORPORATION, JOHNS-MANVILLE SALES CORPORATION, INSULITE COMPANY, FLINTKOTE COMPANY, NATIONAL GYPSUM COMPANY, WOOD CONVERSION COMPANY, ARMSTRONG CORK COMPANY, AND DANT & RUSSELL, INC., DEFENDANTS

Complaint

Filed March 11, 1940

The United States of America, seeking equitable relief, by its attorney, Samuel S. Isseks, special assistant to the Attorney General, acting under the direction of the Attorney General, complains and alleges, on information and belief, as follows:

JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," said act being commonly known as the "Sherman Antitrust Act," and under Section 15 of the Act of Congress of October 15,
9 1914, c. 323, 38 Stat. 730, as amended, said act being commonly known as the "Clayton Act," against the above-named defendants, in order to prevent violations by them jointly and severally, as hereinafter alleged, of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act.

2. The alleged unlawful acts and violations hereinafter described, including the unlawful monopoly, attempt to monopolize, combination and conspiracy to monopolize, and contracts, combination and conspiracy to restrain trade and commerce among the several States of the United States, have been and are, carried out and made effective in part within the Southern District of New York, and many of the unlawful acts done in pursuance thereof have been performed by the defendants, or some of them, and their respective representatives, within said District. Certain of the defendants conduct their business and are found within the said District. The interstate trade and commerce involved in the hardboard industry as hereinafter described are carried on in part within said District.

DESCRIPTION OF DEFENDANTS

3. The defendant Masonite Corporation (sometimes hereinafter referred to as Masonite) is a corporation organized and existing under the laws of the State of Delaware, with its principal office at Chicago, Illinois, and its manufacturing plant at Laurel, Mississippi. Said defendant was organized in 1928, as the successor of Mason Fibre Company (organized as a Delaware corporation in 1926), and Masonite became the owner
10 of the assets of its predecessor corporation, including a number of United States Letters Patent relating to hardboard and to the machinery and processes for the production of hardboard. Said defendant is the largest manufacturer and distributor of hardboard in the United States.

4. The defendant Celotex Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal office at Chicago, Illinois, and its principal manufacturing plant at Marerro, Louisiana. Said defendant was organized in 1936, and is the successor of Celotex Company, which was in receivership for about three years immediately preceding the organization of Celotex Corporation. This defendant is one of the largest producers and distributors of fiber insulation board and other building materials, and is the second largest distributor of hardboard in the United States. (The defendant Celotex Corporation and its predecessors, including the receiver during the period of the receivership, are sometimes hereinafter referred to as Celotex.) Defendant Celotex is the owner of 23.6% of the common stock of defendant Certain-teed Products Corporation, hereinafter described.

5. The defendant Certain-teed Products Corporation (hereinafter sometimes referred to as Certain-teed) is a corporation organized in 1917 and existing under the laws of the State of Maryland, with its principal office at New York City, New York. Said defendant is an important manufacturer of roofing materials, various gypsum products, and fiber wallboard, as
11 well as a national distributor of insulation board and other kinds of building materials. The contract, dated October 29, 1936, between defendant Masonite and Hawaiian Cane Products, Ltd., hereinafter described, was assigned to defendant Certain-teed Products in 1937.

6. The defendant Johns-Manville Sales Corporation (sometimes hereinafter referred to as Johns-Manville Sales) is a corporation organized in 1926 and existing under the laws of the State of New York, with its principal office located at New York City, New York. Johns-Manville Sales is a wholly-owned subsidiary of Johns-Manville Corporation which is one of the largest manufacturers of roofing, insulation, and allied building ma-

terials. Johns-Manville Sales sells the products manufactured by Johns-Manville Corporation, and also sells building materials manufactured by non-affiliated companies.

7. The defendant Insulite Company (sometimes hereinafter referred to as Insulite) is a corporation organized and existing under the laws of the State of Minnesota, with its principal office located at Minneapolis, Minnesota. It was organized for the primary purpose of producing and distributing fiber insulation board produced from waste products resulting from paper-making operations. For many years, Insulite has been one of the most important producers of insulation board, and, in recent years, it has also distributed other kinds of building materials.

8. The defendant Flintkote Company (sometimes hereinafter referred to as Flintkote) is a corporation organized and existing under the laws of the State of Massachusetts, with its principal office at New York City, New York. For many years, this defendant has been primarily engaged in the production and distribution of roofing materials and more recently has also engaged in the distribution of other types of building materials.

9. The defendant National Gypsum Company (sometimes hereinafter referred to as National Gypsum) is a corporation organized in 1926 and existing under the laws of the State of Delaware, with its principal office located at Buffalo, New York. It is one of the most important producers of gypsum products and for a number of years it has also produced and distributed a considerable line of other building materials.

10. The defendant Wood Conversion Company (sometimes referred to as Wood Conversion) is a corporation organized and existing under the laws of the State of Delaware, with its principal office at Cloquet, Minnesota.

11. The defendant Armstrong Cork Company is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal office located at Lancaster, Pennsylvania. This defendant for many years has been one of the most important producers of flooring materials and cork products used in building, and recently defendant Armstrong Cork Company has expanded its activities to include the manufacture and distribution of fiber insulation board and other building materials. In August 1938, defendant Armstrong Cork Company acquired the business of Armstrong Newport Company, which had been engaged in the production and distribution of insulation board and other building materials. (The defendant Armstrong Cork Company and Armstrong Newport Company are sometimes hereinafter referred to as Armstrong.)

12. The defendant Dant & Russell, Inc. (sometimes hereinafter referred to as Dant & Russell) is a corporation organized and existing under the laws of the State of Oregon, with its principal office located at Portland, Oregon. This defendant is the exclusive distributor of fiber insulation board manufactured by Fir-Tex Insulation Board Company, an Oregon Corporation, and it is primarily engaged in the wholesale distribution of insulation board and allied building materials.

DESCRIPTION OF THE INDUSTRY

13. "Hardboard" is a comparatively new product made of vegetable fiber and is used in the building and other industries. It is used in the building industry as wallboard, for decorative panelling, as an interior tile, for flooring, as floor bases, and for forms into which concrete is poured. In addition, it has a wide variety of industrial uses, such as for advertising displays, furniture and cabinets, motion-picture sets, and in the manufacture of the interiors of automobile bodies, streetcars, and trains.

Hardboard is homogeneous, hard, dense, and grainless, varying in thickness from one-tenth to five-sixteenths of an inch. It has a density in excess of twenty-five pounds per cubic foot, and a high resistance to moisture penetration or absorption. The density and hardness of hardboard depend upon the amount
14 of pressure applied to the board during the manufacture, and hardboard is commercially produced in two general classifications, according to the degree of density. The product of lower density is commonly compressed to a thickness of one-quarter inch, and has a density of approximately thirty pounds per cubic foot. This type of board is generally known to the building trade by the name "quarterboard," and the term "quarterboard" is used herein to mean a hardboard having a thickness of one-quarter of an inch, and a density of approximately thirty pounds per cubic foot.

The second class of hardboard is composed of board which is compressed to twice the density of quarterboard, thus having a density of approximately sixty pounds per cubic foot. This product is generally known throughout the building trade by the name "hardboard," as distinguished from the name "quarterboard," but in order to avoid confusion in terminology, the term "pressed wood" is used herein to designate the highly compressed product, having a density of approximately sixty pounds per cubic foot.

Whenever the term "hardboard" is used in this complaint, it shall mean and include both "quarterboard" and "pressed wood" as above defined.

14. At the present time hardboard is commonly made through the explosion by steam of wood chips, resulting in the formation of fibers. The wood fibers are mixed with water and are formed into a felt or "wet lap" by a process similar to that used in paper making. This felt is placed in hydraulic presses, heated by steam, and is then subjected to strong pressure. The resultant product is the hard, dense, grainless "hardboard."

15 EARLY HISTORY OF HARDBOARD

15. The first commercial production of hardboard was started in 1926 by Mason Fibre Company, in a plant at Laurel, Mississippi. This company and its assets were taken over in 1928 by defendant Masonite, which had continued the production of hardboard up to and including the present time. Prior to 1929, defendant Masonite was the only concern in this country engaged in the commercial production of hardboard.

16. Defendant Masonite owns a number of patents covering the machinery and processes involved in the production of hardboard and the product manufactured through the use of such machinery and processes.

17. Through the use of the processes and apparatus described in the patents referred to in paragraph 16 hereof, defendant Masonite has produced hardboard from wood fiber. Masonite's hardboard products have been marketed under certain trade names such as "Quartrboard," "Presdwood," and "Temprtile."

18. Defendant Celotex in the February 1929 issue of its publication entitled "The Celotex News" announced its intention to engage in the production and distribution of a new composition board having the principal characteristics claimed by Masonite for its own product and, like Masonite's product, it was designated by Celotex as "hardboard."

19. Shortly thereafter, about March 1929, Masonite circulated a letter of warning to 17,000 building material dealers throughout the United States and to all manufacturers of composition boards who might intend to produce and distribute hardboard.

16 In this letter Masonite stated that some manufacturers had declared their intention to produce and sell a hardboard which Masonite considered an infringement of its patent rights, that Masonite would vigorously enforce its patent rights, and that all makers, sellers, and users of infringing board would be subject to suit for injunction and damages.

20. During the Spring of the year 1929, Celotex installed machinery in its plant at Marerro, Louisiana, at a cost to it of about $100,000, for the production of hardboard, using sugar cane fiber as the basic material rather than wood. The hardboard pro-

duced in this plant was marketed at prices below those at which Masonite sold its products.

21. In May 1929, and at various times thereafter throughout the years 1929, 1930, and 1931, Celotex suggested to Masonite that it would be desirable for Masonite to enter into a cross-licensing agreement with Celotex involving the Masonite hardboard patents and certain patents owned by Celotex covering processes for the production of hardboard and insulation board. Masonite refused to enter into any such agreement with Celotex.

22. On May 6, 1930, Celotex made a formal written demand upon Masonite to cease disseminating, in the absence of any judicial determination of the validity of the Masonite patents, false and misleading representations to Celotex's customers and prospective customers with respect to alleged infringements by Celotex of Masonite's patents covering hardboard.

23. Thereafter and on June 25, 1930, Masonite gave formal written notice to Celotex that Celotex was infringing U. S. Patent No. 1,767,539, issued on June 24, 1930, to William H. Mason and assigned to Masonite.

24. Celotex during the period of 1929 to 1931 continued the production and distribution of hardboard at prices substantially below those of Masonite.

25. On April 2, 1931, Masonite instituted suit against Celotex in the United States District Court for the District of Delaware charging Celotex with infringement of Masonite's U. S. Patent No. 1,663,505.

26. In addition to Celotex, certain other insulation board manufacturers were producing, or contemplating the production of, hardboard.

27. During the year 1931, defendant Armstrong repeatedly stated to Masonite that it was anxious to obtain a license from Masonite under Masonite's patents; however no such license was granted at that time.

28. In April 1932, defendant Masonite was informed that the United States Gypsum Company was preparing to produce hardboard. Thereupon negotiations were started between Masonite and United States Gypsum Company with a view to granting a license to United States Gypsum Company under Masonite's hardboard patents.

29. During the year 1932, defendant Insulite likewise commenced the production of hardboard similar to that manufactured by Masonite and Celotex and it was marketed under Insulite's trade name. Some of the hardboard produced by Insulite was sold to the building trade and to industrial buyers directly by Insulite and some of it was sold by Insulite to defendant Wood Conversion for resale under Wood Conversion's own brand name.

18 30. On October 19, 1932, the United States District Court for the District of Delaware held that Celotex had not infringed Masonite's Patent No. 1,663,505 (1 Fed. Supp. 494). Masonite thereupon filed an appeal to the United States Circuit Court of Appeals for the Third Circuit.

31. While the appeal to the Circuit Court referred to in Paragraph 30 hereof was pending, defendant National Gypsum suggested to Masonite that an arrangement be made for it to stock and distribute Masonite's various lines of hardboard.

32. On July 6, 1933, the Circuit Court of Appeals for the Third Circuit (one judge dissenting) reversed the decision of the lower court referred to in Paragraph 30 hereof and held that Celotex had infringed Masonite's patent No. 1,663,505 (66 Fed. (2d) 451). Celotex's petition for a rehearing was denied by the Circuit Court of Appeals on August 8, 1933, and Celotex thereupon filed a petition for a writ of certiorari to the Supreme Court of the United States.

33. At the time that defendant Celotex filed its petition for a writ of certiorari, defendant Masonite recognized that if Celotex was successful in the United States Supreme Court, Masonite would have to continue to face severe competition on the part of Celotex and other insulation board manufacturers in the manufacture and distribution of hardboard. At this time Celotex, Insulite, and United States Gypsum Company were actively competing with Masonite in the manufacture and distribution of hardboard; Wood Conversion was competing with Masonite in distributing hardboard manufactured by Insulite; and
19 certain of the other defendants were potential competitors of Masonite in the manufacture and distribution of hardboard.

34. At this time (subsequent to the filing of the petition for a writ of certiorari referred to in paragraph 32 hereof) each of the defendants, Celotex, Flintkote, Johns-Manville Sales, National Gypsum, Insulite and Certain-teed (then distributing products manufactured by Hawaiian Cane Products, Ltd.) had selling agencies and facilities for the nationwide distribution of building materials which were far greater and much more widespread than those possessed by defendant Masonite. These defendants were in a position to distribute on a nationwide scale hardboard either manufactured by themselves or obtained from some one other than Masonite. This actual and potential competition was recognized by Masonite as a source of danger to its business.

35. Furthermore, defendant Masonite doubted that the United States Supreme Court would affirm the decision of the Circuit Court of Appeals, referred to in Paragraph 32 hereof.

OFFENSES CHARGED

36. The defendants have violated and are now violating Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act by unlawfully conspiring to monopolize, monopolizing, attempting to monopolize, and by unlawfully contracting, combining, and conspiring to restrain interstate trade and commerce, and more particularly, by acquiring and maintaining monopolies in the manufacture and in the distribution of hardboard in the United States, by agreeing to maintain uniform
20 prices in the distribution and sale of hardboard in the United States, by agreeing not to engage freely and unrestrictedly in interstate trade and commerce in hardboard, and by agreeing not to engage in the manufacture or in the distribution in interstate trade and commerce of any product which by reason of its physical characteristics and selling price constitutes a commercially competing product with, or substitute for, hardboard. Said conspiracy to monopolize, monopoly, attempt to monopolize, and contracts, combination, and conspiracy to restrain interstate trade and commerce in hardboard and competitive products will hereinafter be set forth.

FORMATION AND CONTINUATION OF THE CONSPIRACY

37. On October 10, 1933, defendants Masonite and Celotex entered into a conspiracy unlawfully to monopolize and unlawfully to restrain trade and commerce among and between the several States of the United States with respect to the manufacture or distribution of hardboard and with respect to the manufacture or distribution of products in competition with hardboard, as hereinafter more fully described.

38. As part of, and in order to carry out the unlawful conspiracy referred to in Paragraph 37 hereof, defendants Masonite and Celotex sought to have join in the said unlawful conspiracy all the major insulation board manufacturers and distributors. Therefore, subsequent to October 10, 1933, the other defendants herein, National Gypsum, Johns-Manville Sales, Armstrong, Wood Conversion, Insulite, Certain-teed, Flintkote, and
21 Dant & Russell, from time to time joined the unlawful conspiracy, monopoly, and restraints of trade referred to in Paragraph 37 hereof and became participants therein, as hereinafter more fully described.

39. Defendants herein have conspired and are now conspiring unlawfully to monopolize, and have unlawfully combined and now are combining to restrain trade and commerce among and between the several States, and such defendants have maintained and now are maintaining an unlawful monopoly, and such de-

fendants have been, and now are, unlawfully restraining trade among and between the several States of the United States with respect to the manufacture and distribution of hardboard, and such defendants have been, and now are unlawfully restraining trade among and between the several States of the United States with respect to the manufacture and distribution of products in competition with hardboard, as hereinafter more fully described.

40. The unlawful conspiracy, monopoly, and combination in restraint of trade referred to in Paragraphs 37, 38, and 39 hereof have been and are the result of a series of wrongful acts extending over several years in the manner and to the extent hereinafter more fully set forth, and such conspiracy, monopoly, and combination were and are being furthered, accomplished, and carried out by such acts and methods.

AGREEMENTS OF OCTOBER 10, 1933, BETWEEN MASONITE AND CELOTEX

41. After Celotex had filed its petition for a writ of certiorari, referred to in Paragraph 32 hereof, Masonite entered into negotiations with Celotex with a view toward (a) avoiding
22 the possibility of a final determination by the United States Supreme Court as to whether Celotex had infringed Masonite's patents; (b) the elimination of further price competition on hardboard between Masonite and Celotex; (c) the discontinuance by Celotex of the production of hardboard or products competitive with hardboard; (d) the restriction of Celotex's sales of hardboard to the building trade, thereby eliminating competition by Celotex in nonbuilding industries; (e) an increase in Masonite's volume of production through the utilization of Celotex's extensive selling organization for increased distribution of hardboard manufactured by Masonite; and (f) increased profits to Masonite and Celotex as a result of an increased margin between cost and selling price.

42. Moreover, Celotex was producing large quantities of insulation board and it recognized that if Masonite, which was manufacturing insulation board as a side line, cut prices on insulation board in retaliation for Celotex's price competition in hardboard, then Celotex's insulation board business would be seriously impaired and resulting profits drastically reduced.

43. As a result of these negotiations Masonite and Celotex, on October 10, 1933, entered into two agreements, one entitled "Agency Agreement and License Option" (sometimes hereinafter referred to as agency agreement), and the other entitled "Supplemental Agreement."

44. By the terms of the purported agency agreement referred to in Paragraph 43 hereof, Celotex agreed to acknowledge the

validity of certain patents owned by Masonite relating to hardboard, to secure from Masonite all hardboard to be sold
23 by Celotex, to adhere to the prices, terms, and conditions of sale to be fixed by Masonite, and to sell hardboard only to certain designated classifications of customers. On the other hand, by the terms of the purported agency agreement, Masonite agreed to manufacture hardboard for sale by Celotex, to adhere in its own sales of hardboard to the prices, terms, and conditions of sale fixed for Celotex, and to give to Celotex a commission, allowance, or discount ranging from 35% to 50% of the price to dealers. Celotex was permitted to cancel the agreement upon six months' notice, but Masonite could not cancel or terminate the agreement except for breach by Celotex of the provisions of the contract, or the failure of Celotex to handle a specified quantity of hardboard. The agreement was to continue until the expiration of the patent having the longest term to run.

45. Under the supplemental agreement referred to in Paragraph 43 hereof, Celotex agreed to withdraw its petition for the writ of certiorari referred to in Paragraph 32 hereof, and to dispose of its existing stock of hardboard products manufactured by it. Masonite, on the other hand, agreed to waive damages for any past infringement of its patents by Celotex, and further agreed to offer Celotex terms and conditions not less favorable than those granted in the future to others.

46. It was also understood between Celotex and Masonite that Celotex would discontinue the manufacture and distribution of its competing line of hardboard; that Celotex would not engage in the manufacture and distribution of any products commercially competitive with Masonite's hardboard; that Celotex would not distribute lines of hardboard, or products com-
24 petitive with hardboard, manufactured by others; and that Celotex would sell hardboard for building uses only, sales to industries other than the building industry to be reserved to Masonite as its own exclusive market.

47. The purpose and effect of the agreements and understanding referred to in Paragraphs 43 and 46 hereof were: (a) to cause Celotex to discontinue the production and distribution of its line of hardboard; (b) to cause Celotex not to engage in the manufacture and distribution of any products commercially competitive with hardboard; (c) to cause Celotex not to engage in the distribution through its widespread sales organization of lines of hardboard and lines of materials competitive with hardboard manufactured by others; (d) to cause Celotex to avoid the necessity of making any further investment in machinery or equipment for the production of hardboard by insuring to it a steady and constant source of supply for its own hardboard

requirements (to be manufactured by Masonite); (e) to eliminate the possibility that Celotex might either obtain a final determination by the United States Supreme Court that it had not infringed Masonite's patents, or resist the Masonite patent claims through courts of other circuits in the United States, or perfect inventions to circumvent the Masonite patents; (f) to insure to Masonite and Celotex an increased margin of profit, through the reduction of cost of production by increased volume, and through elimination of price competition in the sale of hardboard; (g) to restrict Celotex's sales of hardboard to the building trade by reserving to Masonite the industrial market for hard-
25 board; and (h) to eliminate the possibility that Masonite would cut prices on insulation board in retaliation for Celotex's price competition in hardboard sales.

48. The agreements referred to in Paragraph 43 hereof have been designated by defendants Masonite and Celotex as "agency agreements." The plaintiff alleges that said agreements are not agency agreements but are, in fact, agreements intended by Masonite and Celotex to circumvent and defeat the provisions of the antitrust laws, as hereinafter set forth.

AGREEMENTS BETWEEN MASONITE AND NATIONAL GYPSUM (OCTOBER 31, 1933); MASONITE AND JOHNS-MANVILLE SALES (NOVEMBER 30, 1933); MASONITE AND ARMSTRONG (ARMSTRONG-NEWPORT) (DECEMBER 1, 1933); MASONITE AND CERTAIN-TEED (HAWAIIAN CANE PRODUCTS, LTD.) (DECEMBER 4, 1933); MASONITE AND WOOD CONVERSION (JUNE 25, 1934); MASONITE AND INSULITE (FEBRUARY 2 AND FEBRUARY 8, 1935)

49. In pursuance of the unlawful conspiracy and for the purpose of securing, maintaining, strengthening, and extending the conspiracy, monopoly, and combination in restraint of trade heretofore alleged, defendant Masonite prior to and after October, 10, 1933, entered into negotiations with defendants National Gypsum, Johns-Manville Sales, Armstrong, Wood Conversion, and Insulite, and Hawaiian Cane Products, Ltd., with a view towards: (a) preventing them from manufacturing competing lines of hardboard and distributing such lines through their own widespread dealer organizations at prices substantially below Masonite's hardboard prices; (b) preventing them from distributing through their own widespread dealer organizations competing lines of hardboard secured from other manu-
26 facturers; (c) preventing them from manufacturing or distributing any product which by reason of its physical characteristics and selling price might constitute a commercially competing product with hardboard; (d) preventing them from

manufacturing or distributing hardboard for nonbuilding uses; (e) extending Masonite's volume of hardboard business by utilizing their respective widespread dealer organizations; and (f) eliminating price competition in the distribution of hardboard.

50. In pursuance of the said unlawful conspiracy, Masonite and National Gypsum on October 31, 1933, entered into an agreement entitled "Agency Agreement and License Option" (hereinafter sometimes referred to as agency agreement).

51. By the terms of the purported agency agreement referred to in Paragraph 50 hereof, National Gypsum agreed to acknowledge the validity of certain patents owned by Masonite relating to hardboard, to secure from Masonite all hardboard to be sold by National Gypsum (to adhere to prices, terms, and conditions of sale to be fixed by Masonite, and to sell hardboard only to certain designated classifications of customers. On the other hand, by the terms of the purported agency agreement, Masonite agreed to manufacture hardboard for sale by National Gypsum, to adhere in its own sales of hardboard to the prices, terms, and conditions of sale fixed for National Gypsum, and to give to National Gypsum a commission, allowance, or discount ranging from 35% to 50% of the price to dealers. National Gyp-
27 sum was permitted to cancel the agreement upon six months' notice, but Masonite could not cancel or terminate the agreement except for breach by National Gypsum of the provisions of the contract, or the failure of National Gypsum to handle a specified quantity of hardboard. The agreement was to continue until the expiration of the patent having the longest term to run.

52. It was also understood between National Gypsum and Masonite that National Gypsum would not engage in the manufacture and distribution of any competing line of hardboard; that National Gypsum would not engage in the manufacture and distribution of any products commercially competitive with Masonite's hardboard; that National Gypsum would not distribute lines of hardboard or products competitive with hardboard, manufactured by others; that National Gypsum would sell hardboard for building purposes only, sales to industries other than the building industry to be reserved to Masonite as its own exclusive market.

53. In pursuance of the said unlawful conspiracy, Masonite and Johns-Manville Sales on November 30, 1933, entered into two agreements, one entitled "Agency Agreement and License Option" (hereinafter sometimes referred to as agency agreement), and the other entitled "Supplemental Agreement."

54. By the terms of the purported agency agreement referred to in Paragraph 53 hereof, Johns-Manville Sales agreed to ac-

knowledge the validity of certain patents owned by Masonite relating to hardboard, to secure from Masonite all hardboard to be sold by Johns-Manville Sales, to adhere to prices, terms, and conditions of sale to be fixed by Masonite, and to sell hardboard only to certain designated classifications of cus-
28 tomers. On the other hand, by the terms of the purported agency agreement, Masonite agreed to manufacture hardboard for sale by Johns-Manville Sales, to adhere in its own sales of hardboard to the prices, terms, and conditions of sale fixed for Johns-Manville Sales, and to give to Johns-Manville Sales a commission, allowance, or discount ranging from 35% to 50% of the price to dealers. Johns-Manville Sales was permitted to cancel the agreement upon six months' notice, but Masonite could not cancel or terminate the agreement except for breach by Johns-Manville Sales of the provisions of the contract, or the failure of Johns-Manville Sales to handle a specified quantity of hardboard. The agreement was to continue until the expiration of the patent having the longest term to run.

55. By the terms of the supplemental agreement referred to in Paragraph 53 hereof, Masonite agreed: (a) that the purchase of fiber board products for resale (including "Pan L Board") by Johns-Manville Sales from the Oswego Board Corporation would not constitute a violation of the purported agency agreement; (b) to offer Johns-Manville Sales terms and conditions not less favorable than those granted in the future to other purported agents; and (c) in the event that Masonite fixed new prices after Johns-Manville Sales made the initial one-half payment required by the purported agency agreement, and before the second one-half payment became due, such second one-half payment was to be calculated on the basis of the new price.

56. It was also understood between Johns-Manville Sales and Masonite that Johns-Manville Sales would not engage in
29 the manufacture and distribution of any competing line of hardboard; that Johns-Manville Sales would not engage in the manufacture and distribution of any products commercially competitive with Masonite's hardboard; that Johns-Manville Sales would not distribute lines of hardboard, or products competitive with hardboard, manufactured by others; that Johns-Manville Sales would sell hardboard for building purposes only, sales to industries other than the building industry to be reserved to Masonite as its own exclusive market.

57. In pursuance of the said unlawful conspiracy Masonite and Armstrong on December 1, 1933, entered into two agreements, one entitled "Agency Agreement and License Option" (hereinafter sometimes referred to as agency agreement) and the other entitled "Supplemental Agreement."

58. By the terms of the purported agency agreement referred to in Paragraph 57 hereof, Armstrong agreed to acknowledge the validity of certain patents owned by Masonite relating to hardboard, to secure from Masonite all hardboard to be sold by Armstrong, to adhere to prices, terms, and conditions of sale to be fixed by Masonite, and to sell hardboard only to certain designated classifications of customers. On the other hand, by the terms of the purported agency agreement, Masonite agreed to manufacture hardboard for sale by Armstrong, to adhere in its own sales of hardboard to the prices, terms, and conditions of sale fixed for Armstrong, and to give to Armstrong a commission, allowance, or discount ranging from 35% to 50% of the price to dealers. Armstrong was permitted to cancel the
30 agreement upon six months' notice, but Masonite could not cancel or terminate the agreement except for breach by Armstrong of the provisions of the contract, or the failure of Armstrong to handle a specified quantity of hardboard. The agreement was to continue until the expiration of the patent having the longest term to run.

59. By the terms of the supplemental agreement referred to in Paragraph 57 hereof, Masonite agreed to offer Armstrong terms and conditions not less favorable than those granted in the future to other purported agents.

60. It was also understood between Armstrong and Masonite that Armstrong would not engage in the manufacture and distribution of any competing line of hardboard; that Armstrong would not engage in the manufacture and distribution of any products commercially competitive with Masonite's hardboard; that Armstrong would not distribute lines of hardboard, or products competitive with hardboard, manufactured by others; that Armstrong would sell hardboard for building purposes only, sales to industries other than the building industry to be reserved to Masonite as its own exclusive market.

61. In pursuance of the said unlawful conspiracy Masonite and Hawaiian Cane Products, Ltd., on December 4, 1933, entered into an agreement entitled "Agency Agreement and License Option" (hereinafter sometimes referred to as agency agreement).

62. By the terms of the purported agency agreement referred to in Paragraph 61 hereof, Hawaiian Cane Products, Ltd., agreed to acknowledge the validity of certain patents owned by Masonite relating to hardboard, to secure from Masonite
31 all hardboard to be sold by Hawaiian Cane Products, Ltd., to adhere to prices, terms, and conditions of sale to be fixed by Masonite, and to sell hardboard only to certain designated classifications of customers. On the other hand, by the

terms of the purported agency agreement, Masonite agreed to manufacture hardboard for sale by Hawaiian Cane Products, Ltd., to adhere to its own sales of hardboard to the prices, terms, and conditions of sale fixed for Hawaiian Cane Products, Ltd., and to give to Hawaiian Cane Products, Ltd., a commission, allowance, or discount ranging from 35% to 50% of the price to dealers. Hawaiian Cane Products, Ltd., was permitted to cancel the agreement upon six months' notice, but Masonite could not cancel or terminate the agreement except for breach by Hawaiian Cane Products, Ltd., of the provisions of the contract, or the failure of Hawaiian Cane Products, Ltd., to handle a specified quantity of hardboard. The agreement was to continue until the expiration of the patent having the longest term to run.

63. It was also understood between Hawaiian Cane Products, Ltd., and Masonite that Hawaiian Cane Products, Ltd., would not engage in the manufacture and distribution of any competiting line of hardboard; that Hawaiian Cane Products, Ltd., would not engage in the manufacture and distribution of any products commercially competitive with Masonite's hardboard; that Hawaiian Cane Products, Ltd., would not distribute lines of hardboard, or products competitive with hardboard, manufactured by others; that Hawaiian Cane Products, Ltd., would
32 sell hardboard for building purposes only, sales to industries other than the building industry to be reserved to Masonite as its own exclusive market.

64. In pursuance of the said unlawful conspiracy, Masonite and Wood Conversion on June 25, 1934, entered into two agreements, one entitled "Agency. Agreement and License Option" (hereinafter sometimes referred to as agency agreement), and the other entitled "Supplemental Agreement."

65. By the terms of the purported agency agreement referred to in Paragraph 64 hereof, Wood Conversion agreed to acknowledge the validity of certain patents owned by Masonite relating to hardboard, to secure from Masonite all hardboard to be sold by Wood Conversion, to adhere to prices, terms, and conditions of sale to be fixed by Masonite, and to sell hardboard only to certain designated classifications of customers. On the other hand, by the terms of the purported agency agreement, Masonite agreed to manufacture hardboard for sale by Wood Conversion, to adhere in its own sales of hardboard to the prices, terms and conditions of sale fixed for Wood Conversion, and to give to Wood Conversion a commission, allowance or discount ranging from 35% to 50% of the price to dealers. Wood Conversion was permitted to cancel the agreement upon six months' notice, but Masonite could not cancel or terminate the agreement except for breach by Wood Conversion of the provisions of the contract,

or the failure of Wood Conversion to handle a specified quantity of hardboard. The agreement was to continue until the expiration of the patent having the longest term to run.

33 66. By the terms of the supplemental agreement referred to in Paragraph 64 hereof, Masonite agreed: (a) that the acknowledgement by Wood Conversion of the validity of Masonite's patents was not to be construed as binding Wood Conversion to any such admission in interference proceedings in the United States Patent Office involving patents, or applications for patents, under the control of Wood Conversion; (b) to respect as a trade-mark, during the term of the purported agreement referred to in Paragraph 64 hereof, any distinctive name used by Wood Conversion on the hardboard it sold; (c) to offer Wood Conversion terms and conditions not less favorable than those granted in the future to other purported agents; and (d) that in the event of the exercise of the license option by Wood Conversion to waive claims for damages for patent infringement by Wood Conversion.

67. It was also understood between Wood Conversion and Masonite that Wood Conversion would not engage in the manufacture and distribution of any competing line of hardboard; that Wood Conversion would not engage in the manufacture and distribution of any products commercially competitive with Masonite's haardboard; that Wood Conversion would not distribute lines of hardboard, or products competitive with hardboard, manufactured by other; that Wood Conversion would sell hardboard for building purposes only, sales to industries other than the building industry to be reserved to Masonite as its own exclusive market.

68. On March 3, 1934, Masonite instituted suit in the Dis-
34 trict Court for the Northern District of Pennsylvania against the Faxon Lumber Company of Williamsport, Pennsylvania, a dealer in hardboard manufactured by defendant Insulite, for infringement of Masonite's U. S. Patent No. 1,663,505. Since it was the manufacturer of the hardboard distributed through the Faxon Lumber Company, Insulite had a substantial interest in the outcome of this suit, and defended such suit.

69. In pursuance of the unlawful conspiracy, Masonite and Insulite on February 2, 1935, and February 8, 1935, entered into three agreements, one entitled "Agency Agreement and License Option" (hereinafter sometimes referred to as agency agreement), and the others entitled "Supplemental Agreement."

70. By the terms of the purported agency agreement referred to in Paragraph 69 hereof, Insulite agreed not to contest the validity of certain patents owned by Masonite relating to hard-

board during the life of said agreement, to secure from Masonite all hardboard to be sold in the United States by Insulite, to adhere to prices, terms and conditions of sale to be fixed by Masonite, and to sell hardboard only to certain designated classifications of customers. On the other hand, by the terms of the purported agency agreement, Masonite agreed to manufacture hardboard for sale by Insulite, to adhere in its own sales of hardboard to the prices, terms, and conditions of sale fixed for Insulite, and to give to Insulite a commission, allowance or discount ranging from 35% to 50% of the price to dealers. Insulite was permitted to cancel the agreement upon six months' notice, but Masonite could not cancel or terminate the agreement except for breach by Insulite of the provisions of
35 the contract, or the failure of Insulite to handle a specified quantity of hardboard. The agreement was to continue until the expiration of the patent having the longest term to run.

71. Pursuant to the terms of the supplemental agreement referred to in Paragraph 69 hereof, Masonite agreed: (a) to dismiss the pending action against the Faxon Lumber Company, referred to in Paragraph 68 hereof; (b) to buy the hydraulic presses used by Insulite for the manufacture of Insulite's hardboard for $20,000; (c) to purchase insulation board from Insulite; (d) to offer Insulite terms and conditions not less favorable than those granted in the future to other purported agents; (e) that the purported agency agreement referred to in Paragraph 69 hereof was not to constitute an acknowledgment by Insulite of the validity of certain patents except for the duration of said agreement; and (f) that Insulite was to have the right to obtain a royalty-free patent license but without admitting to the validity of certain patents owned by Masonite.

72. It was also understood between Insulite and Masonite that Insulite would discontinue the manufacture of a competing line of hardboard for distribution in the United States; that Insulite would not engage in the manufacture and distribution in the United States of any products commercially competitive with Masonite's hardboard; that Insulite would not distribute in the United States lines of hardboard, or products competitive with hardboard, manufactured by others; that Insulite would sell hardboard for building purposes only, sales to industries other than the building industry to be reserved to Masonite as its own exclusive market.

36 73. In pursuance of the said unlawful conspiracy, Masonite and Agasote Millboard Company (hereinafter sometimes referred to as Agasote) on January 4, 1934, entered into two agreements, one entitled "Agency Agreement and Li-

cense Option" (hereinafter sometimes referred to as agency agreement), and the other entitled "Supplemental Agreement" hereinafter more fully described. Agasote was a large producer and distributor of utility board, a building board which was competitive with hardboard for certain uses.

74. By the terms of the purported agency agreement referred to in Paragraph 73 hereof, Agasote agreed to acknowledge the validity of certain patents owned by Masonite relating to hardboard, to secure from Masonite all hardboard to be sold by Agasote, to adhere to prices, terms and conditions of sale to be fixed by Masonite, and to sell hardboard only to certain designated classifications of customers. On the other hand, by the terms of the purported agency agreement, Masonite agreed to manufacture hardboard for sale by Agasote, to adhere in its own sales of hardboard to the prices, terms and conditions of sale fixed for Agasote, and to give to Agasote a commission, allowance, or discount ranging from 35% to 50% of the price to dealers. Agasote was permitted to cancel the agreement upon six months' notice, but Masonite could not cancel or terminate the agreement except for breach by Agasote of the provisions of the contract, or the failure of Agasote to handle a specified quantity of hardboard. The agreement was to continue until the expiration of the patent having the longest term to run.

37 75. By the terms of the supplemental agreement referred to in Paragraph 73 hereof, Masonite agreed: (a) to permit Agasote to continue to manufacture and distribute utility board; (b) the sale by Agasote of hardboard five feet long, or longer, to builders or owners of vehicles used for transportation would not be considered a violation of the provision limiting sales to building uses; and (c) that Agasote was to be offered terms and conditions not less favorable than those granted in the future by Masonite to other purported agents.

76. It was also understood between Agasote and Masonite that Agasote would not engage in the manufacture and distribution of any competing line of hardboard; that Agasote would not engage in the manufacture and distribution of any products commercially competitive with Masonite's hardboard; that Agasote would not distribute lines of hardboard, or products competitive with hardboard, manufactured by others; that Agasote would sell hardboard for building purposes only, sales to industries other than the building industry to be reserved to Masonite as its own exclusive market.

77. Each of said defendants, Celotex, National Gypsum, Johns-Manville, Armstrong, Wood Conversion, and Insulite, and Hawaiian Cane and Agasote, were induced in part by Masonite to enter into the agreements made by each of them with Masonite

by reason of Masonite's representation that it planned to limit to a small number those it would permit to obtain and distribute hardboard manufactured by it.

78. Each of the agreements referred to in paragraphs 50, 53, 57, 61, 64, 69, and 73 hereof, is designated by
38 defendant Masonite and the other parties thereto as "agency agreements." The plaintiff alleges that said agreements are not agency agreements but are, in fact, agreements intended by Masonite and the other respective parties thereto to circumvent and defeat the provisions of the antitrust laws, as hereinafter set forth.

79. The purpose and effect of the agreements and understandings referred to in the aforementioned paragraphs 50, 52, 53, 56, 57, 60, 61, 63, 64, 67, 69, 72, 73, and 76 were (a) to give Masonite a monopoly in the manufacture of hardboard in the United States by preventing defendants Celotex, National Gypsum, Johns-Manville Sales, Armstrong, Wood Conversion, and Insulite, and Hawaiian Cane and Agasote, from manufacturing competing lines of hardboard or products competitive with hardboard; (b) to give Masonite a monopoly in the distribution of hardboard to industrial buyers in the United States; and (c) to give defendants Masonite, Celotex, National Gypsum, Johns-Manville Sales, Armstrong, Wood Conversion, and Insulite, and Hawaiian Cane and Agasote, a monopoly in the distribution of hardboard in the United States. The agreements reaffirmed, extended, and strengthened the conspiracy, monopoly, and combination in restraint of trade hereinbefore alleged.

80. On or about November 29, 1935, Masonite cancelled the agreement between Masonite and defendant Armstrong referred to in Paragraph 57 hereof. However, shortly after the cancellation of the agreement, Masonite sold to Armstrong three carloads of hardboard products. Armstrong agreed that the filling of such orders should be without prejudice to Masonite's can-
39 cellation of the agreement, and agreed further that in the resale of said products it would observe all the terms and provisions of the cancelled agency agreement. On or about December 24, 1935, Masonite and Armstrong agreed that pending the preparation of a new agreement, the agreement of December 1, 1933, should be temporarily reinstated.

81. On or about November 29, 1935, Masonite cancelled the agreement between Masonite and Agasote, referred to in Paragraph 73 hereof. Thereafter, on or about December 24, 1935, Masonite agreed with Agasote that pending the preparation of a new agreement, the old agreement should be temporarily reinstated. This temporary arrangement continued from time to time

until November 10, 1938, when such agreement was permanently cancelled.

AGREEMENTS OF OCTOBER 29, 1936, BETWEEN MASONITE AND EACH OF THE FOLLOWING: ARMSTRONG, CELOTEX, INSULITE, JOHNS-MANVILLE SALES, NATIONAL GYPSUM, WOOD CONVERSION, AND HAWAIIAN CANE PRODUCTS, LTD.

82. In furtherance of the unlawful conspiracy hereinbefore alleged, Masonite on October 29, 1936, entered into separate new agreements with defendants Celotex, National Gypsum, Johns-Manville Sales, Armstrong, Wood Conversion, and Insulite, and with Hawaiian Cane Products, Ltd. (assigned by Hawaiian Cane in 1937 to defendant Certain-teed). These agreements, together with certain supplemental agreements entered into on the same date, were substituted for the agreements entered into with the same companies, respectively, during the period from October 10, 1933, to February 8, 1935.

40 83. The agreements of October 29, 1936, referred to in Paragraph 82 hereof in each case reaffirmed the terms of the prior purported agency agreements between Masonite and each of the other parties thereto except that in addition, the new agreements provided as follows: (a) prices fixed by Masonite for hardboard were not to be reduced by the alleged agents through the offering of special concessions; and (b) commissions, discounts, or allowances to each of the alleged agents were increased to a maximum of 52%.

84. In addition to the terms of the separate agreements dated October 29, 1936, between Masonite and defendants Celotex, National Gypsum, Johns-Manville Sales, Armstrong, Wood Conversion, and Insulite, and Hawaiian Cane, referred to in Paragraph 82 hereof, the understanding made by each of said defendants and Hawaiian Cane with Masonite at the time that each entered into the original purported agency agreement were continued and reaffirmed, and each of said defendants, and Hawaiian Cane agreed with Masonite that they each would not engage in the manufacture and distribution of any competing line of hardboard; that they each would not engage in the manufacture and distribution of any products commercially competitive with Masonite hardboard; that they each would not distribute lines of hardboard or products competitive with hardboard, manufactured by others; and that they each would sell hardboard for building purposes only, sales to industries other than the building industry being reserved to Masonite as its own exclusive market.

85. On January 30, 1937, Hawaiian Cane assigned to
41 defendant Certain-teed all of Hawaiian Cane's rights in the

agreement referred to in Paragraph 82 hereof; defendant Certain-teed accepted the assignment and agreed to observe all of the terms and provisions of the agreement; and defendant Masonite consented to the assignment of the agreement by Hawaiian Cane to Certain-teed. By reason of the assignment, acceptance of assignment, and consent to assignment, and as a result thereof, the defendant Certain-teed entered into said combination and conspiracy hereinbefore referred to in Paragraph 49 hereof and became a party thereto, and entered into and became a party to the same agreements and understandings with Masonite as Hawaiian Cane as set forth in Paragraphs 82 and 84 hereof.

86. The purpose and effect of each of the agreements and understandings referred to in Paragraphs 82 and 84 hereof thus reaffirmed, extended, and strengthened the conspiracy, monopoly, and combination in restraint of trade hereinbefore described.

AGREEMENTS BETWEEN MASONITE AND FLINTKOTE (MARCH 16, 1937), AND MASONITE AND DANT & RUSSELL (JUNE 19, 1937)

87. In furtherance of the unlawful conspiracy hereinbefore mentioned, Masonite entered into substantially identical agreements with defendant Flintkote on March 16, 1937 (prior to that date Flintkote had been distributing Masonite's hardboard as a selling agent of defendant Insulite), and with defendant Dant & Russell on June 19, 1937.

88. The terms of each of the agreements referred to in Paragraph 87 hereof were substantially in accord with the terms of each of the agreements referred to in Paragraph 82 hereof
42 except that in the agreements between Masonite and Flintkote, and Masonite and Dant & Russell there were the following differences: (a) Masonite had the right to cancel the Flintkote and Dant & Russell agreements at will upon six months' notice; (b) Masonite did not give defendants Flintkote and Dant & Russell an option for a patent license to manufacture hardboard; (c) Flintkote and Dant & Russell were not given the right to have the same terms as to prices as others received from Masonite; and (d) Flintkote and Dant & Russell expressly agreed with Masonite that they each would not distribute in the United States any product which, by reason of its physical characteristics and sales price, constituted a commercially competitive product with Masonite's hardboard.

89. The purpose and effect of the agreements referred to in Paragraph 87 hereof were to secure, maintain, strengthen, and extend the monopoly and combination in restraint of trade heretofore alleged by restraining interstate trade and commerce in the manufacture and distribution of hardboard and by restrain-

ing interstate trade and commerce in the manufacture and distribution of products commercially competitive to hardboard.

EXTENT OF MONOPOLY AND RESTRAINTS OF TRADE

90. Continuously from the dates of their original agreements and understandings, as hereinbefore set forth, to the present time, and in pursuance of and in accordance with the terms and objects of the agreements and understandings, the defendants, Celotex, National Gypsum, Johns-Manville Sales, Armstrong, Wood Conversion, Insulite, Flintkote, and Dant & Russell; and since
43 the date of the assignment of the agreement with Masonite by Hawaiian Cane to defendant Certain-teed, the defendant Certain-teed, (a) have each obtained from Masonite all hardboard distributed and sold by each said defendant; (b) have each sold hardboard only to those certain classifications of trade designated by Masonite; (c) have each, in their sales of such hardboard, adhered to the prices, terms, and conditions of sales fixed by Masonite; (d) have each refrained from the manufacture of any competing line of hardboard for distribution in the United States; (e) have each refrained from the manufacture and distribution of any products commercially competitive with Masonite's hardboard; (f) have each refrained from distributing lines of hardboard or products competitive with hardboard manufactured by others; and (g) have each sold hardboard for building purposes only and have each refrained from selling hardboard to industrial buyers.

91. Continuously from the date of the original agreements and understandings with the various other defendants, as hereinbefore set forth, defendant Masonite (a) has manufactured hardboard for distribution and sale by the other defendants; (b) has fixed prices, terms and conditions of sale at which the said defendants and Masonite have made sales of hardboard; (c) has designated certain classifications of customers to whom the said defendants can make sales of hardboard, reserving to itself the exclusive sale of hardboard for industrial uses; and (d) has granted to the other defendants commissions, allowances, or discounts, ranging from 35% to 52% of the price to dealers.

92. There are at present only two manufacturers of hardboard for distribution in the United States (defendant Insulite
44 manufactures a small quantity of hardboard for export only); Masonite produced in 1938 approximately 96.5% of all hardboard manufactured in the United States, and United States Gypsum Company produced approximately 3.5%.

93. Masonite and the other defendants distributed in 1938 approximately 94.1% of all hardboard used in the United States. The remaining 5.9% was distributed by the United States Gyp-

sum Company, of which 5.9% United States Gypsum Company purchased 2.4% from Masonite.

94. By reason of the foregoing all the defendants herein have monopolized and are monopolizing the manufacture and distribution of hardboard in the United States, and have restrained and are restraining the interstate trade and commerce in the manufacture and distribution of products competitive with hardboard.

ARRANGEMENT BETWEEN MASONITE AND UNITED STATES GYPSUM COMPANY

95. In 1932, United States Gypsum Company advised Masonite that it intended to engage in the production of hardboard. Negotiations were then had between United States Gypsum Company and Masonite looking to the execution of a license agreement or purported agency agreement between them.

96. In 1934 agreements were entered into between Masonite and United States Gypsum Company whereby Masonite agreed to sell to United States Gypsum Company hardboard produced by Masonite, and United States Gypsum Company agreed to sell to Masonite insulation board produced by United States Gypsum Company.

45 97. Since 1934 United States Gypsum Company has purchased from Masonite substantial quantities of hardboard at prices approximately 30% below Masonite's prices to dealers for such hardboard. In addition, United States Gypsum Company from 1934 to the present time, has engaged in its own production of hardboard.

98. From 1934 to the present time, the prices at which United States Gypsum Company has sold hardboard produced by it and hardboard purchased by it from Masonite have been identical with the prices charged by Masonite and fixed by it for the other defendants.

99. Each year since 1934 United States Gypsum Company has produced approximately 3.5% of all hardboard produced in the United States and it has purchased from Masonite approximately 2% of such total production, for resale by United States Gypsum Company.

PRICES, VOLUME OF BUSINESS, AND PROFITS

100. By reason of the conspiracy, monopoly, and combination in restraint of trade hereinbefore alleged, defendant Masonite has maintained, and is maintaining, artificially high, uniform, and non-competitive prices for hardboard throughout the United

States, and such defendant has required the other defendants herein to maintain such prices.

101. By reason of such artificially high, uniform, and non-competitive prices for hardboard, defendant Masonite and the other defendants have each made substantial profits in connection with the manufacture by Masonite and distribution by Masonite and the other defendants of hardboard.

46 102. The substantial commissions, discounts, and allowances paid by Masonite to the other defendants have been, and are, in part responsible for the artificially high and noncompetitive prices in the hardboard industry, and for the substantial profits made by each of the defendants.

103. The artificially high, uniform, and non-competitive prices for hardboard fixed by Masonite for its hardboard product have been, and now are, followed by United States Gypsum Company with respect to the hardboard manufactured and distributed by United States Gypsum Company and with respect to the hardboard purchased by United States Gypsum Company from Masonite.

104. Since 1928, the total volume of hardboard business has grown manifold. In 1928, the total Masonite hardboard sales amounted to approximately 16,000,000 square feet, representing a wholesale value of approximately $575,000. In 1933 (the year of the first purported agency agreement), the total Masonite hardboard sales amounted to 48,362,000 square feet, representing a wholesale value of $1,346,597. In 1937, the total Masonite hardboard sales amounted to 213,354,000 square feet, representing a wholesale value of $5,962,895. In 1938, the total Masonite hardboard sales amounted to 184,875,000 square feet, representing a wholesale value of $5,156,941. In addition, during each of the years 1937 and 1938 United States Gypsum Company's sales of its own hardboard amounted to approximately 8,000,000 square feet, representing a wholesale value of approximately $200,000.

47 NO AGENCY RELATIONSHIP BETWEEN MASONITE AND OTHER DEFENDANTS

105. Plaintiff alleges that defendants have employed as a device to defeat the provisions of the antitrust laws, a simulated del credere factor relationship between Masonite and each of the other defendants who were and are actual or potential competitors of Masonite in the production and distribution of hardboard, for the purpose of eliminating competition in the production and distribution of hardboard and for the purpose of restraining competition in products competitive with hardboard.

106. Important features of the alleged del credere factor agreements between Masonite and the other said defendants under

which hardboard is distributed in interstate trade and commerce in the United States are the following:

(a) Each of the other defendants (with the limited exception of Insulite) agrees to acknowledge the validity of Masonite's patents.

(b) Masonite fixes the selling prices and terms and conditions of sale at which each of the other defendants shall sell hardboard, and Masonite agrees to sell hardboard at prices and on terms and conditions fixed by it for each of the other defendants.

(c) Each of the other defendants, and not Masonite, is responsible for all transportation costs, taxes, excises, insurance, and other charges.

(d) Each of the other defendants agrees not to use Masonite's trade names or trade marks on the hardboard manufactured by Masonite; and Masonite agrees to brand or mark the hard-
48 board which it manufactures for each of the other defendants with their respective trade names or trade-marks.

(e) In the event that each of the other defendants sells hardboard defectively manufactured by Masonite, Masonite agrees to be responsible only to each of the other defendants and only to the extent of replacing the defective hardboard.

(f) Each of the other defendants (except Flintkote and Dant & Russell) may cancel without cause the agreement with Masonite, whereas Masonite may terminate the agreement only for failure by each of the other defendants (except Flintkote and Dant & Russell) to perform the conditions of the agreement.

(g) Masonite agrees not to request from each of the other defendants certain confidential commercial information, such as lists of customers and status of the customers' accounts.

(h) The agreements between Masonite and each of the other defendants are to be cancelled or suspended in respect of hardboard products which have been held to infringe on patents owned by others.

(i) The agreements between Masonite and each of the other defendants are to extend until the expiration of the patent having the longest term to run.

(j) Each of the other defendants agrees to advance to Masonite within twenty days after the close of the calendar month in which Masonite shipped hardboard to such defendant, one-half of the amount due, the balance to be paid within twenty days after the close of the calendar month in which such defendant sells the hardboard to its customers. On direct shipments
49 to the customers of each of the other defendants, such defendant agrees to pay the entire amount to Masonite within twenty days from the close of the calendar month in which the

goods are shipped. All payments by such defendants to Masonite must be made regardless of whether or not the customers of such defendants have made payment for the hardboard delivered to the customers.

(k) Each of the defendants (other than Masonite) is limited in its sales of hardboard (with the exception of short pieces) to certain classes of trade, as defined in the agreement. Masonite reserves to itself sales to the motion-picture industry and other nonbuilding industries.

(l) In each of the agreements between Masonite and the other defendants (except the agreements with Flintkote and Dant & Russell) the alleged factor is given an option to obtain, upon payment of a substantial fee, a nonexclusive license under Masonite's patents to manufacture and sell hardboard products. The proposed license agreement gives Masonite, the proposed licensor, the right to establish and fix the selling prices and terms and conditions of sale at which the proposed licensee may sell hardboard to such classes of trade as designated by Masonite.

107. During the year 1938, defendant Armstrong made a formal application under the provisions of the option referred to in Paragraph 106, subdivision (l) hereof, to become a licensee under Masonite's hardboard patents for the manufacture of hardboard. No such license has been granted by Masonite to Armstrong up to the present time. Masonite's reluctance to grant Armstrong's request for a license to manufacture hardboard is motivated by the following considerations:

(a) Masonite, under the terms of the license, would lose its exclusive position as distributor to the motion picture and other non-building industries.

(b) In the event that the proposed licensee failed to observe the conditions and provisions of the license and thus infringed Masonite's patents, Masonite would be reluctant to experience another judicial test of the validity of its patents.

(c) Masonite would be unwilling to permit such licensees to engage in the manufacture of hardboard, and thus be in a strong position competitive to Masonite after the expiration of Masonite's patents.

108. Defendant Masonite has endeavored by this system of agreements to freeze the commerce in hardboard so that it can absolutely control the prices of hardboard, not only while the hardboard remains in Masonite's hands, but while the hardboard is passing through the hands of the various wholesalers and retailers, and until purchased by the ultimate consumer.

CONCLUSION

109. By establishing and maintaining the conspiracy, monopoly, and combination in restraint of trade, and by the various acts hereinbefore alleged, the defendants herein (i) have obtained and now hold a monopoly of hardboard; (ii) have unreasonably restricted and restrained the production and distribution of hardboard; (iii) have unreasonably restricted and restrained the production and distribution of products in competition
51 with hardboard; (iv) have fixed and maintained arbitrary, artificial, noncompetitive, and rigid prices for hardboard; (v) have discouraged and impeded the progress of science and the useful arts, and have used the patent laws of the United States for purposes inconsistent with the constitutional basis of those laws; and (vi) have monopolized trade and commerce among the several States and have unreasonably restrained such trade and commerce in violation of the laws of the United States.

PRAYER

Wherefore, Plaintiff prays:

(1) That the aforesaid monopoly, attempt to monopolize, combination and conspiracy to monopolize, and contracts, combination, and conspiracy in restraint of trade be adjudged and decreed to be unlawful, and that the agreements, understandings, and practices alleged in this complaint be adjudged and decreed to be in violation of the Sherman Antitrust Act and the Clayton Act.

(2) That the Court adjudge and decree that the defendants have monopolized, attempted to monopolize, combined and conspired to monopolize, and contracted, combined, and conspired to restrain trade in violation of Sections 1 and 2 of the Sherman Antitrust Act and Section 3 of the Clayton Act.

(3) That each of the agreements between Masonite and Celotex, between Masonite and Certain-teed, between Masonite and Johns-Manville Sales, between Masonite and Insulite, between Masonite and Flintkote, between Masonite and National Gypsum, between Masonite and Wood Conversion, be-
52 tween Masonite and Armstrong and between Masonite and Dant & Russell, and any other agreements between and among the defendants, or any of them, be each adjudged to represent an illegal combination or conspiracy to restrain and monopolize trade and commerce, and that the observance of each of such agreements in any respect and the execution of similar agreements be perpetually enjoined.

(4) That the defendants, and each of them, and their officers, directors, agents, representatives, and all persons and corpora-

tions acting and claiming to act on behalf of them, be perpetually enjoined from monopolizing, attempting to monopolize, combining and conspiring to monopolize, or agreeing, combining, or conspiring to restrain trade, and be perpetually enjoined from engaging in or participating in practices, contracts, relationships, or understandings, or claiming any rights thereunder, having a tendency to continue or revive any of the aforesaid violations of the Sherman Antitrust Act and the Clayton Act.

(5) That plaintiff have such other further, general, and different relief as the nature of the case may require and the Court may deem proper in the premises.

(6) That plaintiff recover the cost of this suit.

(7) That pursuant to Section 5 of the Sherman Antitrust Act and Section 15 of the Clayton Act, writs of subpoena issue directed to such of the defendants as are not otherwise subject to service within the District, commanding them and each of them to appear herein and to answer under oath each allegation
53 contained in this complaint and to abide by and perform such acts, orders, and decrees as the Court may make in the premises.

UNITED STATES OF AMERICA,
SAMUEL S. ISSEKS,
Special Assistant to the Attorney General.
ROBERT H. JACKSON,
Attorney General.
THURMAN ARNOLD,
Assistant Attorney General.
SAMUEL S. ISSEKS,
ERNEST S. MEYERS,
Special Assistants to the Attorney General.
GEORGE B. HADDOCK,
KURT BURCHARDT,
Special Attorneys.

54 *Duly sworn to by Samuel S. Isseks; jurat omitted in printing.*

55 In District Court of the United States for the Southern District of New York

[Title omitted.]

Answer of Masonite Corporation
Filed April 29, 1940

Now comes Masonite Corporation, hereinafter sometimes referred to as "defendant" and "this defendant," and for answer to the complaint of the plaintiff filed herein admits, denies and

avers as hereinafter set forth. For brevity and convenience in reference it adopts for the purposes of this answer the short names of the codefendants in this cause as used by the plaintiff in the complaint, except where use of such short names is inaccurate and it is necessary to distinguish between a predecessor and a successor corporation.

56 PART I

A. Answering generally the complaint, this defendant denies that it ever entered into, or in any manner became a party to, any agreement, combination or conspiracy of any kind whatsoever in violation of the antitrust laws or any other laws of the United States, and denies that it is or ever has been a party to any unlawful agreement, combination or conspiracy in restraint of trade or otherwise; and specifically denies any violation or attempted violation in any manner whatsoever of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act or either or any of them.

B. Plaintiff, in support of its various averments of agreements and alleged understandings resulting (as alleged) in a series of wrongful acts and a combination and conspiracy in restraint of trade in what it calls the hardboard industry, has attempted to set forth an historical background for its charges under various headings in its complaint such as "Description of the Industry," "Early History of Hardboard," "Formation and Continuation of the Conspiracy," etc., wherein certain facts, or partial facts, are averred but from which wholly erroneous inferences and portrayals are attempted to be drawn. For clarity and convenience and for a correct understanding of the true historical background involving the invention of hardboard, the patent protection afforded to this defendant, and the agency contracts made by this defendant for the distribution of its patented hardboard, and in order to enable the making of a full and true answer to the complaint this defendant follows the plan of the complaint and further answering generally the complaint, avers as follows:

57 DEFINITION OF HARDBOARD

C. This defendant is engaged chiefly in the manufacture of fiberboard products known as "hardboard" under patents covering the processes and apparatus used in such manufacture, as well as the product itself. In the complaint the term "hardboard" has been used somewhat indiscriminately in various senses, with resulting confusion. Throughout this answer the term "hard-

board" is used with one meaning only, viz, as it is generally known in the trade as designating fiber board products of weight approximately from 30 to 65 pounds per cubic foot and which are manufactured under this defendant's patents as more particularly described hereinafter in paragraphs D and E and 13 and 14 of this answer. "Insulation board" is a fiber board product weighing less than 25 to 30 pounds per cubic foot.

INVENTION OF HARDBOARD

D. Prior to September, 1924, William H. Mason, an engineer and inventor who had been associated for many years with the late Thomas A. Edison, as a result of his experiments discovered that, by exposing chips of wood and other ligno-cellulose material to high pressure steam in a closed vessel called a "gun," and opening a small outlet through which the material was progressively and explosively discharged, he could disintegrate the material into fine fiber containing substantially all the ingredients of the original material.

E. As a result of continued experiments Mason discovered that from fine fiber of wood or woody material containing substantially all the natural ingredients he could produce a dense,
58 hard, homogeneous, grainless, fiber board product of great strength and highly resistant to moisture penetration. This was accomplished by controlled application of heat and pressure to the fine fiber of wood or woody material, taking advantage of the bonding and cementing characteristics of the natural ingredients thereof known as fiber encrustants and lignins. Thus Mason invented a new fiber board product which he first called "hardboard."

F. Mason filed patent applications to cover his various inventions from time to time conceived, and assigned the same to this defendant, which was incorporated in 1925 for the purpose of acquiring and developing Mason's patents and inventions and financing the manufacture and distribution of the patented products. Mason has continued to be and now is an active officer of this defendant, in charge of its research, and he and this defendant, have developed and are constantly using a large and efficient research organization, looking to the discovery of new and improved methods and processes for the manufacture of hardboard, of which he was the inventor, as well as new and improved fiber board products, and the manufacture of which products has been perfected, extended and commercially developed by him and this defendant since its discovery and establishment by them.

DEFENDANT'S BUSINESS POLICY

G. It has been the continuous and deliberately established policy of this defendant to manufacture and sell the greatest amount of hardboard at the lowest prices consistent with quality and service, and to expand the use thereof in the building and other industries through good management, increased efficiency, and constantly enlarged research.

59 H. The result of this policy has been that this defendant's hardboard has gained universal acceptance, and is used in the building industry as wallboard, for decorative paneling, as interior wall tile, for flooring, as floor bases, for forms in which concrete is poured, and numerous other uses, and in addition there has been developed a wide variety of uses for hardboard in nonbuilding industries such as advertising displays, furniture and cabinets, motion-picture sets, and in the construction of the interior of automobile bodies, streetcars, and trains. In all of these fields hardboard is in active and direct competition with other materials, such as lumber, plywood, gypsum board, wallboard, floor coverings and many others, and has proven to be superior to previously existing competing products and has continued to be superior in many fields of use to new and improved competing products which have since been developed and which are being sold in competition with it.

DEFENDANT'S HARDBOARD PATENT ADJUDICATED

I. Defendant's basic patent covering the fiberboard product hardboard as above described and the process of making it has been judicially considered and held valid and infringed. On April 2, 1931, defendant instituted suit thereon against The Celotex Company (the predecessor of The Celotex Corporation, a codefendant herein) in the United States District Court for the District of Delaware, charging The Celotex Company with the infringement of Mason's United States Patent 1,663,505 (which issued in 1928 and will not expire until 1945) as a result on July 6, 1933, the United States Circuit Court of Appeals for the Third Circuit held that said patent was valid and had been in-

60 fringed by The Celotex Company and its receivers, said company having been placed in Equity Receivership by order of the United States District Court for the District of Delaware on June 16, 1932. This litigation is hereinafter further referred to in paragraphs J, 22, 23, 25, 30, 32, 41, and 45 of this answer.

SETTLEMENT OF PATENT LITIGATION AND MAKING OF AGENCY CONTRACTS

J. At the time said decision was rendered this defendant was a relatively small corporation engaged primarily in research and development and had inadequate sales outlets for its products. The cost of the patent litigation had put a great strain on its financial resources so that it was badly handicapped for funds to carry on and promote its business. The building industry was and is a particularly difficult industry in which to introduce a new product because it is necessary to convince not only the ultimate user, but also the architect, engineer, dealer, and contractor, of the desirability of any such new product in order to establish a market. After careful consideration, this defendant decided that it was necessary to employ agents having nationally established distribution facilities in the building industry for the further introduction and sale of its hardboard in that industry throughout the United States, it being the considered opinion of this defendant that such procedure would result in increasing the volume of sales of the product and thus permit of the development of a large and efficient manufacturing plant, with the consequent large-scale economies in cost of production and lowering of prices to the ultimate consumer. This decision was made primarily as a result of negotiations between this defendant and the Federal equity receivers of said The
61 Celotex Company looking to a compromise and settlement of further prospective litigation following the above mentioned decision of the United Sates Circuit Court of Appeals for the Third Circuit. These negotiations resulted in the preparation of two contracts between this defendant and Hobart P. Young and Colin C. Bell, as such receivers for The Celotex Company, one captioned "Agency Agreement and License Option" and the other captioned "Supplemental Agreement." Under the first of the contracts The Celotex Company, operating through its said receivers and under the primary jurisdiction of the United States District Court for the District of Delaware and the ancillary jurisdiction of the United States District Court for the Northern District of Illinois, was appointed a nonexclusive agent to sell and distribute to its large list of dealers and jobbers throughout the United States the hardboard manufactured by this defendant; and under the second of these contracts or "Supplemental Agreement," this defendant agreed to waive an accounting and damages against The Celotex Company and its receivers and to release them from the effect of an injunction, and said receivers agreed to dismiss their application to the Supreme Court of the United States for a writ of certiorari to

review the decision of the Circuit Court of Appeals for the Third Circuit. The receivers for The Celotex Company then petitioned the United States District Court for the District of Delaware and the Northern District of Illinois, respectively, for instructions in the matter. Thereupon on or about October 12, 1933, Judge John P. Nields, United States District Judge for the District of Delaware (being the same judge before whom the patent litigation had been tried in the trial court) signed an order instructing and directing said receivers to execute said contracts, and on or about October 10, 1933, Judge James H. Wilkerson,
62 one of the judges of the United States District Court for the Northern District of Illinois, signed a similar order. Thereupon, pursuant to the instructions and at the direction of said two United States District Judges then having jurisdiction of, and exercising control over, the property and business of The Celotex Company, said contracts were executed and delivered. These contracts so approved by the courts are the contracts by which the plaintiff avers that the unlawful conspiracy to monopolize and restrain trade in hardboard was initiated.

K. Again, on March 3, 1934, this defendant instituted suit in the District Court of the United States for the Northern District of Pennsylvania against Faxon Lumber Company, a dealer in a fiberboard product manufactured by defendant Insulite, for infringement of the same Mason patent. The defense of the suit was taken over by Insulite, as manufacturer. This defendant is informed and avers the fact to be that Insulite then was, and at all times thereafter has continued to be, a wholly owned subsidiary of Minnesota and Ontario Paper Company, a Maine corporation; that Minnesota and Ontario Paper Company was at that time in Federal equity receivership with its properties and business under the jurisdiction of the United States District Court for the District of Minnesota, Fourth Division; that after said infringement suit had been pending for several months and Insulite and the receivers of said Minnesota and Ontario Paper Company had become fully aware of the patent situation, a settlement was reached between the parties whereby the bill of complaint was dismissed, and Insulite was granted by this defendant a license to manufacture hardboard under this defendant's patents for export only, and nonexclusive agency contract
63 to act as the agent of this defendant in the sale and distribution of hardboard throughout the United States; that said settlements was reached and said contracts executed only after the matter had been submitted to said United States District Court for the District of Minnesota, Fourth Division, by a petition of the receivers and an order of said court entered

thereon authorizing the execution of said contracts. The contracts so executed pursuant to the authority of said United States District Court are the contracts between this defendant and Insulite dated February 2, 1935, which the plaintiff alleges were in furtherance of the unlawful conspiracy to restrain trade and commerce.

L. These contracts with the receivers for The Celotex Company and with Insulite, and each of them, were negotiated in a spirit of compromise and for the purpose of promoting peace and avoiding further litigation and expense and the destructive consequences thereof, and of avoiding the risk that technical advancement might be blocked; and it was not intended thereby to, nor did these contracts, restrain or monopolize trade or commerce but, on the contrary, they expanded and broadened the use and sale of hardboard. Each of said agency contracts provided for the consignment of this defendant's hardboard to an agent which sold the same on a commission basis which was sufficient to enable the agent to assume all responsibility for collections and credits and to pay certain freight, insurance and storage charges, and was a true del credere factor agreement, i. e., an old and well-established form of agency contract wherein the principal consigns its merchandise to an agent who sells the same on commission and guarantees collections and credits when the merchandise is sold.

64 RESULTS OF OPERATIONS UNDER THE AGENCY CONTRACTS HAVE BEEN TO ADVANCE SCIENCE AND INDUSTRY

M. The various patents of this defendant were generally recognized as being valid, broad and basic patents covering the process of making hardboard, the apparatus therefor, and the product itself; and even prior to the adjudication in the patent infringement suit by the Circuit Court of Appeals for the Third Circuit, above referred to, requests were coming in to this defendant from various concerns interested in supplying the demands of their customers for hardboard for the privilege of distributing hardboard manufactured by this defendant or manufacturing hardboard under its patents. To meet this situation and pursuant to its decision above mentioned this defendant made similar nonexclusive agency contracts with the other codefendants, which were also del credere factor agreements. This defendant at all times since the making of said agreements has continued to sell hardboard direct to the building industry in competition throughout the entire United States with its various agents. This defendant's direct sales of hardboard to the building industry are larger than such sales of any one of its del

credere factors and are nearly equal in volume to the hardboard sales of all of them combined. This defendant and each of said factors compete with each other in solicitation of said business, and the hardboard so sold to said building industry is in competition with many other products, at least thirty in number, for use in the building industry, and the amount of hardboard so sold to the building industry for such use is substantially less than 5 percent of the amount of products sold to the building industry in competition therewith.

65 "N. The result of this defendant's selling its hardboard through its del credere agents herein having nationwide distributing facilities has been to largely increase the volume of sales, to effect substantial economies in manufacturing operations and selling costs, to substantially reduce the retail price to the ultimate consumer, to broaden the field of use for hardboard and to provide reasonable and legitimate profits to this defendant. The agents were required by the agency agreements to pay various costs, such as transportation, insurance and storage, yielding them a net commission which was reasonable, and resulted in their making relatively small net profits on the handling of hardboard and keeping down the cost of hardboard to the ultimate consumer. All of this has been accomplished notwithstanding increased taxes, labor and raw material costs, and the fact that hardboard must compete with many and very active competitive products, as hereinbefore mentioned.

O. In the manufacture of this defendant's hardboard, and particularly in the earlier years thereof, there inevitably resulted two grades, those which completely passed the rigid inspection necessary for satisfactory use in the building industry, known as "firsts," and those which would not pass such inspection, known as "seconds." This defendant did not desire "seconds" to be sold to the building industry because many of these seconds were entirely unsuitable for the requirements of that industry and their sale therein would result in dissatisfied customers. For that reason and because continuing research was necessary to fit hardboard to the varying requirements of existing non-building industries and of new industries made possible by availability of

66 hardboard and the capacity of hardboard for being put to new uses, and because it was necessary to salvage hardboard not passing inspection as "firsts" in order to reduce manufacturing costs, this defendant, in making each of these agency contracts, reserved solely to itself, as it was lawfully entitled to do, the right to sell hardboard to others than the building industry.

P. Each and every contract entered into with a codefendant has been severally negotiated as a result of arms-length dealing.

There is not and never has been any interlocking situation existing between this defendant and the other defendants. None of the officers or directors of this defendant are or ever have been officers or directors of any of the other defendants, nor has there been any community of stockholdings to the knowledge of this defendant. The salaries paid by this defendant have always been moderate, its directors have at all times served without compensation, and its bonus plan now in effect for employees excludes all directors and chief executive officers.

Q. This defendant has at all times conducted its business with due regard to broad social and economic objectives. It is devoting its energies to research and the development of new and improved products, to the providing of steady year-round employment, to the promotion of better labor and living conditions, to reforestation, and to the making and selling of more and better products at a reasonable profit and reasonable sales expense. It has now dependent on it approximately two thousand employees, has made complete medical and hospital facilities available to its plant employees and to members of their families solely at the expense of this defendant, has made repeated voluntary wage increases, and is paying the highest labor wage scale known to the State of Mississippi.

67 PART II

Further answering the complaint, with the paragraphs of Part II of this answer numbered to correspond with the paragraph numbers in the complaint:

1. Defendant admits that the complaint is filed and that these proceedings are instituted under Section 4 of the Sherman Anti-Trust Act and under Section 15 of the Clayton Act in order to prevent alleged violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act; but denies any violation or attempted violation in any manner whatsoever of said Sections 1 and 2 of the Sherman Act and said Section 3 of the Clayton Act or either or any of them.

2. Defendant denies each and every averment of paragraph 2 of the complaint except that it admits that certain of the defendants conduct their business and are found within the Southern District of New York and that hardboard is sold in interstate commerce in part within said District.

3. Defendant admits that defendant, Masonite Corporation, is a corporation organized and existing under the laws of the State of Delaware, with its principal office at Chicago, Illinois, and that it has its manufacturing plant at Laurel, Mississippi. Defendant avers that said corporation was organized in 1925 as

Mason Fibre Company, and that in 1928 the corporate name thereof was changed by proper amendment of its Certificate of Incorporation to Masonite Corporation. Defendant avers that it is the only lawful manufacturer of hardboard for distribution and sale in the United States, said hardboard being manufactured exclusively under certain United States patents owned by this defendant, all of which hardboard is
68 sold and distributed by this defendant either directly or through its del credere agents, the co-defendants herein. Defendant avers that it (the defendant itself) is the largest distributor of hardboard in the United States and that its sales of hardboard to the building industry far exceed those of any one of its del credere agents, being nearly equal to their combined hardboard sales. Defendant denies each and every averment of paragraph 3 of the complaint, except as in this paragraph admitted.

4. Defendant admits that The Celotex Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal office at Chicago, Illinois, and that it has a manufacturing plant at Marrero, Louisiana; that it was organized as the successor in reorganization proceedings to the former The Celotex Company; and that of Masonite's del credere agents it is the largest distributor in the United States of hardboard manufactured by Masonite; but is without knowledge or information sufficient to form a belief as to the truth of the other averments in paragraph 4 of the complaint.

5. Defendants admits that Certain-teed Products Corporation is a corporation organized and existing under the laws of the State of Maryland, with its principal office at New York City, New York; admits that the del credere agency contract dated October 29, 1936, between this defendant and Hawaiian Cane Products, Ltd., was assigned to said defendant Certain-teed Products Corporation in 1937; but is without knowledge or information sufficient to form a belief as to the truth of the other averments in paragraph 5 of the complaint.

6. Defendant avers that Johns-Manville Sales Corpora-
poration is a corporation organized and existing under
69 the laws of the State of Delaware, with its principal offices located at New York, New York; but is without knowledge or information sufficient to form a belief as to the truth of the other averments in paragraph 6 of the complaint.

7. Defendant admits that Insulite Company is a corporation organized and existing under the laws of the State of Minnesota, with its principal office located at Minneapolis, Minnesota; but is without knowledge or information sufficient to form a belief as to the truth of the other averments in paragraph 7 of the complaint.

8. Defendant admits that The Flintkote Company is a corporation organized and existing under the laws of the State of Massachusetts, with its principal office in New York, New York; but is without knowledge or information sufficient to form a belief as to the truth of the other averments in paragraph 8 of the complaint.

9. Defendant admits that National Gypsum Company is a corporation organized and existing under the laws of the State of Delaware, with its principal office located at Buffalo, New York; but is without knowledge or information sufficient to form a belief as to the truth of the other averments in paragraph 9 of the complaint.

10. Defendant admits that Wood Conversion Company is a corporation organized and existing under the laws of the State of Delaware, with its principal office located at Cloquet, Minnesota.

11. Defendant admits that Armstrong Cork Company is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal office located at Lancaster, Pennsylvania; but is without knowledge or information sufficient to form a belief as to the truth of the other averments in paragraph 11 of the complaint.

70 12. Defendant admits that Dant & Russell, Inc., is a corporation organized and existing under the laws of the State of Oregon, with its principal office located in Portland, Oregon; but is without knowledge or information sufficient to form a belief as to the truth of the other averments of paragraph 12 of the complaint.

13. Defendant denies each and every averment of paragraph 13 of the complaint, except it admits that the statements therein descriptive of hardboard are generally correct if confined to this defendant's manufacture. Defendant avers that its registered trade-mark for hardboard weighing approximately 30 pounds per cubic foot is "Quartrboard" and its registered trade-mark for hardboard weighing approximately 60 pounds per cubic foot is "Presdwood." Defendant avers that hardboard is a new and patented product that was invented by said William H. Mason, is made of vegetable fiber as exemplified by wood and woody type materials and as outlined in paragraph 14 of this answer and is used in the building industry and for industrial uses substantially as averred in paragraph 13 of the complaint.

14. Defendant denies each and every averment of paragraph 14 of the complaint, except it admits that defendant manufactures hardboard on patented machines and by patented processes which are generally as therein described, and avers that the process is so operated as to cause the fiber to be compressed and to be cemented together by the natural encrustants or lignins of the wood or vegetable fiber into a hard, dense, grainless, homogeneous prod-

uct of high tensile strength and great resistance to penetration by moisture. This defendant avers that the production of good hardboard has been developed only through long, continuous, painstaking and expensive research by said Mason and this
71 defendant, including testing of very many types of process and machinery, that the conditions under which the product is produced must be carefully controlled in order that they may result in a hardboard of high grade and quality, and that defendant's hardboard has been and is widely and favorably known throughout the United States and elsewhere as a result of the methods used in its manufacture by defendant.

15. Defendant admits that the commercial production of hardboard was started in 1926 by this defendant under its then name of Mason Fibre Company, at Laurel, Mississippi, but denies that the assets of said Mason Fibre Company were taken over in 1928 by any other corporation, and avers that Mason Fibre Company is the same corporation as this defendant, its name having been duly changed in 1928 to Masonite Corporation. This defendant admits that it was the only concern engaged in the commercial production of hardboard in this country prior to 1929, with the exception of a possible infringer or infringers thus engaged.

16. Defendant admits the averments contained in paragraph 16 of the complaint.

17. Defendant admits the averments contained in paragraph 17 of the complaint and avers that its trade names "Quartrboard," "Presdwood," and "Temprtile" are trade-marks duly registered with the United States Patent Office, and that their use is limited to this defendant.

18. Defendant denies each and every averment contained in paragraph 18 of the complaint except that it admits that in the February 1929 issue of "The Celotex News" it was stated that Celotex intended to engage in the production and distribution of a fiber board product which was referred to therein as
72 "hard panel board", and not as "hardboard" as is averred in paragraph 18 of the complaint.

19. Defendant admits that in March of 1929, it circulated a warning to 17,000 building material dealers throughout the United States and to such manufacturers as might have been contemplating infringement on defendant's patent rights by way of either production or distribution, and that such warning notified the recipients that this defendant intended to protect itself against infringement of its patents and patent rights by proper action.

20. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 20 of the complaint, except that it admits that in the year

1929 The Celotex Company had installed certain machinery at its plant at Marrero, Louisiana, for the production of a fiber board product which The Celotex Company designated "hard panel board", using sugar cane fiber (known as "bagasse") as the basic material; and further admits that the product produced at such plant was offered for sale at prices below those at which defendant's hardboard was being sold at the time; but this defendant avers that while the method and product of The Celotex Company constituted an infringement on the patent rights of this defendant, such hard panel board so produced by The Celotex Company was greatly inferior in quality, having a much lower strength and resistance to moisture than defendant's hardboard, and was not fit for nearly as many uses as was said defendant's hardboard.

21. Defendant admits that during the years 1929, 1930, and 1931, The Celotex Company suggested that this defendant enter into cross-licensing agreements with it, but avers that such
73 agreements were never entered into; and this defendant avers further that it, at that time, considered The Celotex Company to be an infringer on its patent rights, and intended to, and did, assert such rights by court action, and refused to enter into any cross-licensing agreement.

22. Defendant admits that in May of 1930 it received a written demand from counsel for The Celotex Company substantially as described in paragraph 22 of the complaint.

23. Defendant admits the averment contained in paragraph 23 of the complaint as relating to The Celotex Company.

24. Defendant denies each and every averment contained in paragraph 24 of the complaint except that it admits that during the period from 1929 to 1931, The Celotex Company continued the production and distribution of its so-called hard panel board at prices less than the prices at which this defendant sold its hardboard.

25. Defendant admits the averments contained in paragraph 25 of the complaint as relating to The Celotex Company.

26. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment in paragraph 26 of the complaint.

27. Defendant denies each and every averment contained in paragraph 27 of the complaint except that it admits that during the year 1931 Armstrong stated to defendant that it was desirous of obtaining a manufacturing license under Masonite's patents, but no agreement was reached and no such license was ever granted.

28. Defendant denies each and every averment contained
74 paragraph 28 of the complaint, except that it admits that it was informed in 1932 that the United States Gypsum Com-

pany intended to produce a fiber board product, which said Company designated by the same term as previously used by The Celotex Company, viz, "hard panel board," and that during such year negotiations were entered into between defendant and United States Gypsum Company with a view to defendant granting a manufacturing license to United States Gypsum Company under defendant's hardboard patents, but no license agreement was ever consummated.

29. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 29 of the complaint, except that it admits that during the year 1932 defendant Insulite commenced the production of a fiber board product which it called "Insulite Hardboard"; that this product was marketed under Insulite's trade name; that some of this product was sold to the building trade directly by Insulite, and that some of it was sold by Insulite to defendant Wood Conversion for resale under Wood Conversion's own brand name.

30. Defendant admits the averments contained in paragraph 30 of the complaint as relating to The Celotex Company and its receivers.

31. Defendant admits the averments in paragraph 31 of the complaint and avers that National Gypsum's suggestion that it be allowed to stock and distribute defendant's hardboard was in line with the recognition by the industry of this defendant's claim that its patents were of basic character and could not successfully be circumvented or combated.

32. Defendant admits that on July 6, 1933, the Circuit
75 Court of Appeals for the Third Circuit reversed the decision of the lower Court as alleged in paragraph 32 of the complaint and held that this defendant's patent No. 1,663,505 was valid and had been infringed by The Celotex Company; and admits that the petition for a rehearing filed by the receivers for The Celotex Company was denied by the Circuit Court of Appeals on August 8, 1933 and that thereafter said receivers filed their petition for a writ of certiorari to the Supreme Court of the United States.

33. Defendant denies each and every averment contained in paragraph 33 of the complaint except it admits that at the time that such receivers for The Celotex Company filed their petition for a writ of certiorari, the said receivers of The Celotex Company, and Insulite were manufacturing and selling fiber board products in competition with this defendant's hardboard, and Wood Conversion Company was distributing the fiber board product manufactured by Insulite.

34. Defendant admits the averments contained in the first sentence of paragraph 34 of the complaint except that it denies knowl-

edge or information sufficient to form a belief as to the exact extent of such sales facilities. Defendant denies each and every averment contained in the last two sentences in paragraph 34 of the complaint.

35. Defendant denies each and every averment contained in paragraph 35 of the complaint.

36. Defendant denies each and every averment contained in paragraph 36 of the complaint.

37. Defendant denies each and every averment contained in paragraph 37 of the complaint.

38. Defendant denies each and every averment contained in paragraph 38 of the complaint.

76 39. Defendant denies each and every averment contained in paragraph 39 of the complaint.

40. Defendant denies each and every averment contained in paragraph 40 of the complaint.

41. Defendant denies each and every averment contained in paragraph 41 of the complaint, except that it admits that after the decision of the Circuit Court of Appeals referred to in paragraph 32 of the plaintiff's complaint and after the filing by the receivers for The Celotex Company of their petition for writ of certiorari, certain negotiations were had between Hobart P. Young, one of said receivers, and this defendant, but it denies that said negotiations were originated by this defendant and further denies that said negotiations were for any of the purposes alleged in clauses (a), (b), (c), (d), or (f) of paragraph 41 of the complaint; and this defendant further answering said paragraph avers as follows:

(a) The negotiations between this defendant and the said Hobart P. Young, as one of the Federal equity receivers of said The Celotex Company, were undertaken with the purpose and intent of seeking a compromise and settlement of further prospective litigation following the above-mentioned decision of the United States Circuit Court of Appeals. In arriving at a basis for such proposed compromise and settlement it was recognized that this defendant's patent had been held valid and infringed by The Celotex Company and its receivers and that it was res adjudicata that neither The Celotex Company nor its receivers had any right to manufacture or sell hardboard covered by said patent. As a result of said negotiations the Agency Agreement and License Option and the Supplemental Agreement thereto referred to in paragraph 43 of the complaint were prepared. Thereupon

77 said receivers petitioned the United States District Court for the District of Delaware and the Northern District of Illinois, respectively, for instructions in the matter, and on or about October 12, 1933, Judge John P. Nields, United States District Judge for the District of Delaware (being the same judge be-

fore whom the patent litigation had been tried in the trial court) signed an order instructing and directing said receivers to execute said contracts; and on or about October 10, 1933, Judge James H. Wilkerson, one of the judges of the United States District Court for the Northern District of Illinois had signed a similar order. Pursuant to the instructions and at the direction of said two United States District Judges then having jurisdiction of, and exercising complete control over, the property and business of The Celotex Company, said contracts were executed and delivered.

(h) By said Agency Agreement this defendant authorized The Celotex Company and its receivers to act as its non-exclusive del credere factor to sell and distribute to the building industry throughout the United States hardboard manufactured by this defendant under its patents, this defendant retaining to itself the right to sell its hardboard to the non-building industries for the reasons stated in Paragraph O of this answer. By said Supplemental Agreement this defendant agreed to waive an accounting and damages against The Celotex Company and its receivers and to release them from the effect of an injunction, and said receivers agreed to dismiss their application to the Supreme Court of the United States for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Third Circuit. These are the contracts by which the plaintiff alleges that the unlawful conspiracy to monopolize and restrain trade in
78 hardboard was initiated. This defendant further avers that, instead of constituting any unlawful agreement or conspiracy, the making of said contracts was wholly lawful and resulted in an increased volume of production and distribution of its hardboard, permitting economies of operation which resulted in lower costs to the ultimate consumer.

42. Defendant admits that The Celotex Company had been producing insulation board in substantial quantities, but denies knowledge or information sufficient to form a belief as to all other averments in this paragraph, and further denies that defendant cut prices on insulation board, had any intention so to do, or made any threats whatsoever in connection therewith, or took any steps or made any threats or had any intention to retaliate in any manner whatsoever.

43. Defendant denies each and every averment contained in paragraph 43 of the complaint except that it admits that certain agreements dated as therein averred were made with the receivers for The Celotex Company, and avers that these agreements were not made as the result of any unlawful plan, unlawful monopoly, conspiracy, intent to restrain trade, or unlawful negotiation whatso-

ever, and further avers that said agreements have long since been canceled and are no longer in force and effect.

44. Defendant denies each and every averment contained in paragraph 44 of the complaint except as hereinafter admitted; and avers that the aforesaid agreement between it and the receivers for The Celotex Company was strictly an agency agreement of a type which had been developed at common law very many years ago and was known as a del credere factor's agreement, and admits that said receivers acting for and on behalf of The Celotex
79 Company agreed to acknowledge the validity of certain patents owned by defendant relating to hardboard, but only while said agreement remained in force; avers that said agreement has been long since terminated and is no longer in force and effect; and avers that paragraph 44 of the complaint does not state all of the pertinent provisions of the contract, and for greater certainty refers to the original agreement with the same force and effect as if it were herein set forth at length.

45. Defendant admits that it entered into a supplemental agreement with the receivers for The Celotex Company and that the averments in respect to the contents of such supplemental agreements so far as they are set out in paragraph 45 are correctly stated, but avers that said paragraph does not state all of the pertinent provisions of said supplemental agreement, and for greater certainty refers to the original agreement with the same force and effect as if it were herein set forth at length.

46. Defendant denies each and every averment contained in paragraph 46 of the complaint.

47. Defendant denies each and every averment contained in paragraph 47 of the complaint.

48. Defendant denies each and every averment contained in paragraph 48 of the complaint except that defendant admits that the agreements were captioned "Agency Agreement and License Option" and "Supplemental Agreement" respectively.

49. Defendant denies each and every averment contained in paragraph 49 of the complaint.

50. Defendant denies each and every averment contained in paragraph 50 of the complaint but admits the making of an agreement with the co-defendant therein named on the date
80 therein mentioned, captioned "Agency Agreement and License Option," and avers that said agreement has long since been canceled and is no longer in force and effect.

51. Defendant denies that the true contents, meaning and legal effect of the agreement referred to in paragraph 51 of the complaint are as therein stated; and for greater certainty with reference to the meaning, terms, and effect thereof, the defendant re-

fers to the original agreement with the same force and effect as if it were set forth herein at length.

52. Defendant denies each and every averment contained in paragraph 52 of the complaint.

53. Defendant denies each and every averment contained in paragraph 53 of the complaint but admits the making of agreements with the co-defendant therein named on the dates therein mentioned captioned "Agency Agreement and License Option" and "Supplemental Agreement" respectively, and avers that said agreements have long since been canceled and are no longer in force and effect.

54. Defendant denies that the true contents, meaning and legal effect of the agreement referred to in paragraph 54 of the complaint are as therein stated; and for greater certainty with reference to the meaning, terms, and effect thereof, the defendant refers to the original agreement with the same force and effect as if it were set forth herein at length, and avers that said agreement has long since been canceled and is no longer in force and effect.

55. Defendant denies that the true contents, meaning, and legal effect of the agreement referred to in paragraph 55 of the complaint are as therein stated; and for greater certainty with
81 reference to the meaning, terms, and effect thereof, the defendant refers to the original agreement with the same force and effect as if it were set forth herein at length, and avers that said agreement has long since been canceled and is no longer in force and effect.

56. Defendant denies each and every averment contained in paragraph 56 of the complaint.

57. Defendant denies each and every averment contained in paragraph 57 of the complaint, but admits the making of agreements with the co-defendant therein named on the dates therein mentioned, captioned "Agency Agreement and License Option" and "Supplemental Agreement" respectively, and avers that said agreements have long since been canceled and are no longer in force and effect.

58. Defendant denies that the true contents, meaning and legal effect of the agreement referred to in paragraph 58 of the complaint are as therein stated; and for greater certainty with reference to the meaning, terms and effect thereof, the defendant refers to the original agreement with the same force and effect as if it were set forth herein at length.

59. Defendant denies that the true contents, meaning and legal effect of the agreement referred to in paragraph 59 of the complaint are as therein stated; and for greater certainty with reference to the meaning, terms and effect thereof, the defendant refers

to the original agreement with the same force and effect as if it were set forth herein at length.

60. Defendant denies each and every averment contained in paragraph 60 of the complaint.

61. Defendant denies each and every averment contained
82 in paragraph 61 of the complaint, but admits the making of an agreement with the co-defendant therein named on the date therein mentioned captioned "Agency Agreement and License Option," and avers that said agreement has long since been canceled and is no longer in force and effect.

62. Defendant denies that the true contents, meaning and legal effect of the agreement referred to in paragraph 62 of the complaint are as therein stated; and for greater certainty with reference to the meaning, terms and effect thereof, the defendant refers to the original agreement with the same force and effect as if it were set forth herein at length.

63. Defendant denies each and every averment contained in paragraph 63 of the complaint.

64. Defendant denies each and every averment contained in paragraph 64 of the complaint, but admits the making of agreements with the co-defendant therein named on the dates therein mentioned, captioned "Agency Agreement and License Option" and "Supplemental Agreement" respectively, and avers that said agreements have long since been canceled and are no longer in force and effect.

65. Defendant denies that the true contents, meaning and legal effect of the agreement referred to in paragraph 65 of the complaint are as therein stated; and for greater certainty with reference to the meaning, terms and effect thereof, the defendant refers to the original agreement with the same force and effect as if it were set forth herein at length.

66. Defendant denies that the true contents, meaning and legal effect of the agreement referred to in paragraph 66 of the
83 complaint are as therein stated; and for greater certainty with reference to the meaning, terms and effect thereof, the defendant refers to the original agreement with the same force and effect as if it were set forth herein at length.

67. Defendant denies each and every averment contained in paragraph 67 of the complaint.

68. Defendant admits that on March 3, 1934, it instituted suit in the District Court of the United States for the Northern District of Pennsylvania against Faxom Lumber Company of Williamsport, Pennsylvania, a dealer in hardboard manufactured by defendant Insulite, for infringement of its United States Patent No. 1,663,505, all as more particularly averred in para-

graph K of this answer. Defendant admits the averments contained in the last sentence of paragraph 68 of the complaint.

69. Defendant denies each and every averment contained in paragraph 69 of the complaint, but admits the making of agreements with the co-defendant therein named on the dates therein mentioned, captioned "Agency Agreement and License Option" and "Supplemental Agreement" respectively; avers that said contracts were duly authorized by the United States District Court for the District of Minnesota, Fourth Division, all as more particularly averred in paragraph K of this answer; and avers that said agreements have long since been canceled and are no longer in force and effect.

70. Defendant denies that the true contents, meaning and legal effect of the agreement referred to in paragraph 70 of the complaint are as therein stated; and for greater certainty with reference to the meaning, terms and effect thereof, the defendant refers to the original agreement with the same force and effect as if it were set forth herein at length.

84 71. Defendant denies that the true contents, meaning and legal effect of the agreement referred to in paragraph 71 of the complaint are as therein stated, and for greater certainty with reference to the meaning, terms and effect thereof, the defendant refers to the original agreement with the same force and effect as if it were set forth herein at length.

72. Defendant denies each and every averment contained in paragraph 72 of the complaint.

73. Defendant denies each and every averment contained in paragraph 73 of the complaint, but admits the making of agreements with the co-defendant therein named on the dates therein mentioned, captioned "Agency Agreement and License Option" and "Supplemental Agreement" respectively, and avers that said agreements have long since been canceled and are no longer in force and effect. Defendant admits the averments in the last sentence of paragraph 73 of the complaint.

74. Defendant denies that the true contents, meaning and legal effect of the agreement referred to in paragraph 74 of the complaint are as therein stated; and for greater certainty with reference to the meaning, terms and effect thereof, the defendant refers to the original agreement with the same force and effect as if it were set forth herein at length.

75. Defendant denies that the true contents, meaning and legal effect of the agreement referred to in paragraph 75 of the complaint are as therein stated; and for greater certainty with reference to the meaning, terms and effect thereof, the defendant refers to the original agreement with the same force and effect as if it were set forth herein at length.

85 76. Defendant denies each and every averment contained in paragraph 76 of the complaint.

77. Defendant denies each and every averment contained in paragraph 77 of the complaint.

78. Defendant denies each and every averment contained in paragraph 78 of the complaint.

79. Defendant denies each and every averment contained in paragraph 79 of the complaint.

80. Defendant denies each and every averment contained in paragraph 80 of the complaint, except that it admits that prior to the cancellation asserted by the defendant the orders for defendant's hardboard referred to in the complaint had been placed through Armstrong, and that the defendant, when so advised of the fact, filled the said orders as it was legally bound to do; and defendant further admits that on or about December 24, 1935, without prejudice to the rights of either party as to said asserted cancellation, and pending the preparation of a new agreement, the agreement of December 1, 1933, was temporarily reinstated.

81. Defendant admits the averments in paragraph 81 of the complaint.

82. Defendant denies each and every averment contained in paragraph 82 of the complaint, but avers that on October 29, 1936, written agreements were made with the defendants named in paragraph 82 of the complaint and that all prior agreements with said defendants and each of them were canceled.

86 83. Defendant denies that paragraph 83 of the complaint correctly states the true contents, meaning and legal effect of the agreements of October 29, 1936, and for greater certainty the defendant refers to the actual terms of said agreements with the same force and effect as if herein set forth at length.

84. Defendant denies each and every averment contained in paragraph 84 of the complaint.

85. Defendant denies each and every averment contained in paragraph 85 of the complaint, except that it admits the assignment of the contract to defendant Certain-teed and defendant's consent thereto.

86. Defendant denies each and every averment contained in paragraph 86 of the complaint.

87. Defendant denies each and every averment contained in paragraph 87 of the complaint, except it admits that prior to March, 1937, Flintkote had been distributing Masonite's hardboard as selling agent of Insulite.

88. Defendant denies that the true contents, meaning and legal effect of the agreements referred to in paragraph 88 of the complaint are as therein stated; and for greater certainty with reference to the meaning, terms and effect thereof, the defendant

refers to the original agreements with the same force and effect as if they were set forth herein at length.

89. Defendant denies each and every averment contained in paragraph 89 of the complaint.

90. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 90 of the complaint and affirmatively denies that any acts such as those set forth in paragraph 90 of the complaint, if done, were done pursuant to or as part of any combination or conspiracy or agreement in restraint of trade or commerce.

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91. Defendant denies each and every averment contained in paragraph 91 of the complaint, but admits that from the time of the making of the respective del credere factor contracts with the respective codefendants herein it has (a) manufactured hardboard and supplied the same on consignment to its respective del credere factors for distribution and sale by them as agents; (b) pursuant to said del credere factor contracts fixed prices, terms and conditions of sale at which said agents as such and this defendant have made their respective sales of hardboard; (c) pursuant to said del credere factor contracts designated the classifications of customers to whom the said agents as such might make sales of hardboard and reserved to itself generally the exclusive sale of hardboard to the non-building industries; and (d) allowed to the said agents commissions upon the sale by them as agents of this defendant's hardboard ranging from 35% to 52% of its carlot list price to dealers, which said commissions varied with the different types of hardboard and also with the amount of total annual sales by the agents.

92. Defendant denies knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 92 of the complaint.

93. Defendant denies knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 93 of the complaint, but defendant admits that United States Gypsum Company purchased hardboard from this defendant.

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94. Defendant denies each and every averment contained in paragraph 94 of the complaint.

95. Defendant denies each and every averment contained in paragraph 95 of the complaint, except that it admits that in the year 1932 it was informed that the United States Gypsum Company intended to engage in the production of a so-called hard panel board and that negotiations were entered into during that year with a view of making an agreement between United States Gypsum Company and this defendant, which agreement pro-

posed to give the United States Gypsum Company a license to manufacture hardboard under defendant's patents, but no such contract was ever consummated; and defendant avers that it had no knowledge as to whether the so-called hard panel board which United States Gypsum Company was contemplating producing would constitute an infringement of defendant's patent rights; and further avers that United States Gypsum Company did not commence the commercial manufacture of hard panel board until 1934.

96. Defendant admits the averments contained in paragraph 96 of the complaint.

97. Defendant denies each and every averment contained in paragraph 97 of the complaint, except that it admits that United States Gypsum Company has purchased from defendant substantial quantities of hardboard at prices approximately 30% below defendant's dealer carlot prices. As to the second sentence in paragraph 97 of the complaint the defendant, in addition to the above denial, avers that said United States Gypsum Company has been manufacturing various types of products at different times and under different processes and that it has claimed
89 the same to be made under inventions which were covered by patent applications on file in the United States Patent Office; that for several years last past this defendant and said United States Gypsum Company have been in interference in the Patent Office and engaged in litigation as to who was the inventor of the process, and that recently that matter has been finally determined in favor of this defendant; that since that determination said United States Gypsum Company has notified defendant that it has changed its process and states that it does not now infringe but refuses to disclose its process; and this defendant has been constantly endeavoring to ascertain what the facts are so as to enable it to decide whether said company is actually producing a product which is an infringement of the patents of this defendant and, if so, exactly what patents are infringed; that until this information is obtained, this defendant cannot decide upon a definite courses of action relating to enforcing its patent rights as against said United States Gypsum Company.

98. Defendant is without knowledge or information sufficient to form a belief concerning any of the averments contained in paragraph 98 of the complaint.

99. Defendant is without knowledge or information sufficient to form a belief as to any of the averments contained in paragraph 99 of the complaint, except that it admits that United States Gypsum Company has purchased hardboard from this defendant.

100. Defendant denies each and every averment contained in paragraph 100 of the complaint.

101. Defendant denies each and every averment contained in paragraph 101 of the complaint.

90 102. Defendant denies each and every averment contained in paragraph 102 of the complaint.

103. Defendant denies each and every averment contained in paragraph 103 of the complaint.

104. Defendant admits the averments contained in the first sentence of paragraph 104 of the complaint; admits that the annual footage figures of hardboard sales for certain years as therein stated are approximately correct; admits that the dollar figures of hardboard sales for certain years as therein stated are approximately correct if by "wholesale value" is meant gross receipts from sales less only freight and allowances with no deductions for manufacturing, shipping, selling costs (including the agents' commissions), advertising or administrative costs; denies knowledge or information sufficient to form a belief as to the sales of products manufactured by United States Gypsum Company; and except as herein specifically admitted, denied or qualified, denies each and every averment contained in said paragraph of the complaint.

105. Defendant denies each and every averment contained in paragraph 105 of the complaint.

106. Defendant denies each and every averment contained in paragraph 106 of the complaint, and avers that all the conclusions and characterizations therein contained as to important features of the del credere factor agreements are not correctly stated, and for greater certainty and accuracy the defendant refers to the actual terms of said agreements with the same force and effect as if they were set forth herein at length.

107. Defendant denies each and every averment contained

91 in paragraph 107 of the complaint except that it admits that during the year 1938 co-defendant Armstrong initiated certain informal discussions with this defendant concerning the matter of procuring a license for the manufacture of hardboard under the provisions of the option for a license contained in its del credere agreement with this defendant, and avers that at the conclusion of such discussions Armstrong determined that it did not desire to exercise its said option, and further avers that Armstrong made no application or demand for a license and that accordingly no license has been granted.

108. Defendant denies each and every averment contained in paragraph 108 of the complaint.

109. Defendant denies each and every averment contained in paragraph 109 of the complaint and specifically denies having established, maintained or been a party to any conspiracy, monopoly or combination in restraint of trade by means of acts therein

alleged, or any other acts, and specifically denies that it has committed the alleged illegal acts therein referred to, or any of them.

Defendant denies each and every averment in the complaint not herein before admitted, controverted or explained, or specifically denied.

In concluding this answer, and while praying that this suit be dismissed, the defendant asserts that it has done equity, has always desired and has been willing, and now desires and is willing, to do equity and to confer and cooperate with the Government in all reasonable and proper ways and in the furtherance of appropriate commercial and social objectives. Because of the facts and reasons set forth in Part I of this answer, the defendant believes and states that its development and use of its
92 patents have at all times been lawful and have made distinct and socially important contributions to the progress of the arts and sciences and to the comfort and welfare of the American people. Wherefore, defendant prays that this suit be dismissed.

BREED, ABBOTT & MORGAN,
15 Broad Street, New York, New York,
Attorneys for Defendant Masonite Corporation.
By CHARLES H. TUTTLE,
A partner of said firm.

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LOUIS QUARLES,
411 East Mason Street, Milwaukee, Wisconsin,
Of Counsel.

93 [*Duly sworn to by Ben Alexander; jurat omitted in printing.*]

94 In District Court of the United States For the Southern District of New York

[Title omitted.]

Supplemental answer of Masonite Corporation

As a supplemental answer to the complaint herein and by way of an additional, separate and complete defense, and partial defense, to the cause of action set forth in the complaint herein, Masonite Corporation alleges:

PART III

1. After joinder of issue herein and as of March 20, 1941, the defendant, Masonite Corporation, made an agreement separately

with each of the other defendants. Each agreement was in the same form; and a copy of such form is hereto annexed, marked Exhibit "A" and made a part hereof. This agreement was in each case executed in duplicate by Masonite Corporation and the respective other defendants; and it is now in full force and effect; and the respective parties thereto are now acting thereunder.

95 These agreements, hereinafter referred to collectively as the "new agreement", were dated as of March 20, 1941, and cancelled and terminated the then existing del credere agreements between this defendant and the respective other defendants, and any supplement or supplements thereto. This new agreement completely supersedes and replaces any and all preexisting agreements between the respective parties relating to the manufacture, distribution and sale of the various products of this defendant known as "hardboard" as defined in Paragraph C of Part I of the answer of this defendant.

As of the same date, i. e., March 20, 1941, this defendant made a supplemental agreement with Celotex Corporation continuing in force for the life or the said "new agreement" the previously existing supplemental agreement relating to the estoppel by judgment in respect of the final decree entered against the Celotex Company and its receivers by this defendant in the patent suit in the District Court of the United States for the District of Delaware; and this defendant also, as of the same date, made two letter agreements with Insulite Company, one of which continued in force for the life of the said "new agreement" the previously existing agreement with Insulite dated February 1, 1938, and the other whereof continued in force for the life of the said "new agreement" the previously existing export agreement of February 2, 1935, as modified by an agreement supplemental thereto of February 8, 1935 and as later modified by said agreement of February 1, 1938.

2. In making this new agreement and this supplemental answer, this defendant had and has no idea or intention of withdrawing, altering or qualifying in any respect whatever any of the denials or allegations made by it in its original answer herein, or of

96 admitting, expressly or by implication, any of the charges or allegations in the complaint or the illegality or impropriety to any extent whatsoever of any action by it or by any of the defendants or of any prior agreement or arrangement between it and any of the defendants. On the contrary, this defendant expressly affirms and realleges all the denials and allegations contained in its prior answer.

3. On March 26, 1941, this defendant through its counsel, presented to and filed with the Attorney General of the United States of America several copies of the aforesaid form of new agreement (Exhibit "A" hereof), and informed the Attorney General that it was about to make a new agreement in such form with

each of the other defendants respectively, and that it stood ready to make like agreements with any other persons or corporations who, in its judgment, could and would fulfill the terms and obligations thereof. At the same time, this defendant, through counsel, also informed the Attorney General that it would be glad to be informed of any view or opinion by the Attorney General as to the legality or illegality, propriety or impropriety, of such new agreement or of any clause or provision thereof, in order that it might have the opportunity of considering revision or alteration of the new agreement in such wise as to meet and remove, if reasonably possible, any criticism of its contents by the Attorney General, while at the same time enabling it to continue with the manufacture, sale, and distribution of hardboard. This defendant thereby sought, while fully maintaining the allegations of its answer, to afford to the Attorney General a basis for the discontinuance of the present suit without need for trial or occasion for controversy.

4. After an examination of the new agreement by the Anti-Trust Division of the Department of Justice of the United States of America, the Attorney General through his representatives informed the counsel of this defendant that it would not accord with the policy of the Department to express in advance any view or opinion concerning the new agreement or concerning any portion thereof; that Masonite Corporation and the other defendants had a right to make any new agreement as to their respective businesses, in accordance with law; and that after the new agreement was made by Masonite Corporation with any or all of the other defendants or with any other agents, the Department would then determine its opinion and course with respect thereto and with respect to its effect, if any, upon the present suit.

5. Thereupon it was agreed that a supplemental answer or answers embodying the new agreement could be served as a matter of course and without further notice; and that the Attorney General could serve and file as matter of course a supplemental pleading in rejoinder if he so desired.

6. This defendant and each of the other defendants have at all times been desirous of complying with the law and of conducting its business in accordance with the Statutes of the United States; and it believes that it has done so at all times. This defendant, however, is aware and alleges that there are and have been divergent opinions as to the proper construction, interpretation, and application of those Statutes, and particularly of the Anti-Trust Statutes. The aforesaid new agreement has been made for the purpose of placing the conduct of the hardboard business by Masonite Corporation and all its media of distribution beyond the possibility of even plausible criticism under the Anti-Trust Statutes and yet preserving this business according to the rights of

this defendant and in the interest of the building and construction industries of the United States and of the American public. No ulterior or hidden purpose is sought to be accomplished by
93 the new agreement. No conspiracy or combination to restrain interstate trade, or to fix prices or to monopolize is embodied in or lurks behind the new agreement. The making thereof and the terms and provisions thereof have been carefully considered by the respective counsel of this defendant and of the other defendants; and all counsel have advised their respective clients that the making of this new agreement, and the terms and provisions thereof, are, in their several opinions, wholly lawful and free from encroachment upon any statutory restrictions or prohibitions.

7. Accordingly, this defendant is serving this supplemental answer in order that the new agreement and the making thereof may be brought within the scope and purview of the present action, for judgment and determination by the court as to the complete lawfulness thereof, and for such effect in connection with the disposition and dismissal of the present suit as may be lawful.

8. It is also the purpose and intent of this defendant to observe fully and completely in letter and in spirit and in the utmost good faith all the terms and conditions and provisions of the new agreement. This defendant hereby disclaims and denies any intention at any future time to reinstate any preexisting agreement cancelled and terminated by the new agreement.

99 Wherefore, Masonite Corporation prays that the relief demanded in the complaint be denied and that the suit be dismissed as against each and all of them.

BREED, ABBOTT & MORGAN,
15 Broad Street, New York, N. Y.,
Attorneys for Defendant Masonite Corporation.
By CHARLES H. TUTTLE,
A partner of said firm.

CHARLES H. TUTTLE,
THOMAS E. KERWIN,
15 Broad Street, New York, N. Y.
FLETCHER LEWIS,
135 South LaSalle Street, Chicago, Ill.
LOUIS QUARLES,
411 East Mason Street, Milwaukee, Wis.,
Of Counsel.

Joined in by:
Insulite Company.
Wood Conversion Company.
Dant & Russell, Inc.

100 *Exhibit A*

APPOINTMENT OF AGENT

HARDBOARD PRODUCTS

Memorandum of agreement made and entered into as of March 20, 1941, by and between Masonite Corporation, a Delaware corporation (hereinafter called "Manufacturer") and_____

_____

a corporation of the State of_____ (hereinafter called "Agent"):

1. Appointment of Agent and Scope of Authority.—Manufacturer hereby appoints Agent a non-exclusive selling agent of Manufacturer with authority to sell hardboard products of the sizes and types hereinafter mentioned manufactured by Manufacturer under United States Letters Patent, to the classes of buyers hereinafter described, in the territory limited to continental United States including Alaska and the Hawaiian Islands, upon terms and conditions of sale to be prescribed from time to time by Manufacturer and for such period as hereinafter defined.

Agent hereby accepts appointment as agent of Manufacturer, with authority limited as aforesaid, and agrees to comply with and perform the terms and conditions to be performed on the part of Agent, as stated herein.

2. Classes of Buyers to Which Agent May Sell.—Agent is authorized to sell to the following classes of buyers who are engaged in distributing and reselling such products, to-wit: (a) wholesalers approved as such by Manufacturer, (b) retail lumber and building material supply dealers and (c) reserve supply companies approved as such by Manufacturer. Agent may also sell direct to United States Government or any official department thereof. In addition, Agent may sell the hardboard products which Agent is authorized to sell hereunder to

101 such other and further classes of buyers of hardboard products, engaged in distributing and reselling such hardboard products, as Manufacturer may sell any of its hardboard products from time to time and to contractors or builders for building uses if Manufacturer shall adopt a policy of selling to such other classes of buyers, but in no event to industrial purchasers for their use in manufacturing or fabricating processes other than building; provided, however, that Agent may sell to such other and further classes of buyers only so long as Manufacturer shall engage in selling hardboard products to such other classes of buyers.

Agent has no authority to sell, transfer or dispose of hardboard products except as herein expressly provided; and Agent will not control or attempt to control the prices, terms or conditions upon which any buyer shall resell any hardboard products.

3. Products Agent Is Authorized to Sell.—Agent may sell all types and sizes of hardboard products manufactured and distributed by Manufacturer from time to time for sale to the classes of trade to which Agent is authorized to sell, and in the respective sizes, types and lengths as shown in Manufacturer's catalogues and price lists, provided, however, that Agent is not authorized to sell (a) Special Tempered Concrete Form Board or (b) hardboard products (other than Century of Progress Flooring and Patterned Ceiling) which have been subjected to some additional processing, treatment or fabrication by Manufacturer, other than tempering, priming, coating, dyeing or coloring.

4. Prices, Terms and Conditions of Sale.—All sales and quotations shall be made by Agent at such prices and upon such terms, conditions and provisions as may be established by Manufacturer from time to time for the respective classes of buyers to which Agent is authorized to sell and as Manufacturer shall set
102 forth in its published catalogues and price lists from time to time, copies of which shall be furnished Agent promptly when issued.

Agent will not accept any order for sale or future delivery of hardboard hereunder which does not contain a reasonable force majeure clause approved by Manufacturer.

Agent is not authorized to make warranties or representations in connection with the sale of hardboard which may require Manufacturer to assume liability beyond Manufacturer's obligation to furnish to the buyer at Manufacturer's expense hardboard of the same size, grade and quality originally ordered by buyer, to replace defective hardboard delivered to such buyer pursuant to such sale.

Manufacturer shall give Agent not less than 10 days' prior notice of the effective date of any increases in Manufacturer's selling prices and of any changes in terms, conditions and provisions of sale and delivery in the event that such changes are less favorable than those then prevailing; and shall give Agent not less than 48 hours' prior notice of the effective date of any decrease in Manufacturer's selling prices or of any changes in the terms, conditions and provisions of sale and delivery in the event that such changes are more favorable than those then prevailing. In any event, Manufacturer shall communicate such changes to Agent at the same time that Manufacturer informs any of its selling outlets of such changes, and Manufacturer shall promptly furnish Agent copies of all Manufacturer's published price lists wherein such changes are set forth.

In the event such increase or decrease is made, the provisions relating to such change, as contained in Manufacturer's applicable published catalogue and price list, shall be observed by Agent. Agent shall furnish Manufacturer inventories of consignment stocks as of the dates on which price changes become effective.

Agent shall not sell hardboard products on combined bids or in any other manner which does not fully disclose to the buyer the prices, terms and conditions of sale and delivery on which such hardboard products are offered for sale.

5. Consignment Stocks.—Manufacturer shall maintain at such of Agent's plants or warehouses as Agent may designate consignment stocks of hardboard products, the quantity of which, in so far as practicable, shall approximate two months' estimated deliveries on sales made by Agent from consignment stocks. All hardboard in consignment stocks shall be and remain the property of Manufacturer until ownership passes from Manufacturer to a buyer. Such consignment stock in the types and sizes as furnished by Manufacturer, until it shall be sold or disposed of in accordance with Agent's authority hereunder, shall be stored and housed by Agent in its plants or warehouses in such manner as to afford ready inspection and identification by Manufacturer, and any duly authorized representative of Manufacturer shall have access at all times during business hours to the place or places where said hardboard is so stored and held. Said products shall be kept properly segregated and identified as the property of Manufacturer, and Agent shall furnish and maintain suitable signs indicating the fact that the hardboard so stored is the property of Manufacturer. Agent shall not cut, fabricate or process any consignment stock.

6. Return of Consignment Stocks.—Agent shall return to Manufacturer (at Manufacturer's expense) at any time when directed by it all or any part of the consignment stock which has not been sold. Agent shall return to Manufacturer (at Manufacturer's expense) all unsold hardboard in consignment stock, as well as all undistributed samples, within 10 days after the termination of the appointment of Agent.

104 7. Deliveries.—Agent is hereby authorized to make sales and deliveries from consignment stocks and to accept and transmit to Manufacturer orders for hardboard products to be delivered direct by Manufacturer to buyers on orders obtained by Agent, but subject to the conditions and limitations herein provided.

8. Freight, Taxes, Insurance, Handling Expenses, etc.—Manufacturer shall pay freight charges from Manufacturer's plant at Laurel, Mississippi, to Agent's warehouses on all consignment stocks furnished Agent hereunder. Manufacturer shall also pay all taxes imposed upon consignment stocks and shall insure such

consignment stocks against loss or damage by fire and other usual hazards. Agent shall pay all expenses for storage, cartage, transportation (except freight on original consignment stocks), and in addition all other costs, outlays, and expenses in connection with, or incidental to, the handling of consignment stocks or the making of sales or deliveries therefrom; but Agent shall not be liable for taxes, excises, fees, or other governmental charges which Manufacturer is required to absorb pursuant to any provision of law applicable to sales made hereunder.

9. Shipments.—All shipments, whether for consignment stocks or to buyers pursuant to orders obtained by Agent, shall be made from Manufacturer's plant at Laurel, Mississippi, loaded in railroad cars only. Manufacturer shall not be obligated to make shipments other than in amounts necessary to make or complete carlot quantities, but such carlot quantities may be diversified as between the various hardboard products or such other products of the kind and character now or hereafter manufactured or distributed by Manufacturer, if, under railroad tariff classifications in effect at the time of shipment, the same may be combined with hardboard products at the same freight rate or combined under any other conditions utilized by Manufacturer in its sales to any of its buyers of the classes to which Agent is authorized to sell.

105 10. Equal and Ratable Treatment.—Manufacturer shall secure to buyers obtained by Agent, as favorable treatment in respect of promptness in filling orders as is granted by Manufacturer to any other of its buyers of the classes to which Agent is authorized to sell hereunder. In event the aggregate demand for Manufacturer's hardboard products from all sources is in excess of Manufacturer's capacity so as to require the scaling down of shipments, Manufacturer shall, during the time such condition exists, afford ratable treatment to Agent's orders by prorating all shipments of hardboard products including shipments on orders obtained by Manufacturer's own employees (but not including Manufacturer's orders from industrial purchasers for (a) sizes less than 4' x 5' boards resulting from the normal accumulation of such lengths, (b) off-grade board, or (c) hardboard products to be used in connection with fabrication or manufacturing processes for national defense, other than housing) on the basis of shipments made to buyers during the ninety (90) day period immediately preceding the commencement of such scaling down of shipments.

Manufacturer shall not grant to any agent authority to sell Manufacturer's hardboard products to the classes of buyers to which Agent is authorized to sell hereunder which contains more

favorable terms or provisions than are contained herein without extending the same to Agent hereunder, provided, however, that (a) the making or continuing by Manufacturer of different net compensation to offset geographical disadvantages, or (b) the making or continuing by Manufacturer of special concessions in good faith to settle litigation, shall not be deemed the granting of more favorable terms or conditions to any other agent.

11. Proceeds Held in Trust, etc.—Sales of hardboard products may be made by Agent either in the name of Manufacturer or in the name of Agent, as agent, provided such agency is dis-
106 closed. All hardboard products which Agent is authorized to sell hereunder (whether shipped direct by Manufacturer on orders obtained by Agent or delivered from consignment stocks) shall remain the property of Manufacturer until ownership shall pass from Manufacturer to buyer, and no ownership in said hardboard products shall vest in Agent at any time. The proceeds of all hardboard sold shall be held in trust for the benefit and for the account of Manufacturer until fully accounted for as hereinafter provided.

12. Reports by Agent.—Agent shall render to Manufacturer not later than the 20th day of each month a report on forms provided by Manufacturer covering sales made by Agent during the preceding calendar month and a complete itemized report or inventory of all of Manufacturer's hardboard products on hand and in the custody of Agent at the close of the last day of business in the preceding calendar month. Agent shall also render at the termination of its appointment a similar report of all such hardboard products.

13. Remittances.—Not later than the 20th day of each calendar month Agent shall account for and remit to Manufacturer all amounts collected by Agent up to the end of the preceding calendar month as proceeds of the sale of hardboard products sold hereunder, after deducting therefrom the current commissions of Agent with respect to such products computed in the manner provided in Schedule A annexed hereto.

14. Examination of Agent's Accounts.—Agent shall keep complete and accurate records and books of account containing full data and information in respect of all of its transactions in connection with its handling, sale, and distribution of Manufacturer's hardboard products hereunder, and such books and records shall be open at all times during business hours to inspection and examination by Manufacturer.

107 15. Guaranties by Agent.—Agent guarantees the due and prompt payment to Manufacturer for all sales effected by Agent hereunder. On the 20th day of each calendar month Agent shall pay to Manufacturer any balance due Manufacturer with re-

spect to any such guaranteed account which remained unpaid for a period of more than 60 days as at the last day of the preceding calendar month. Such payment shall constitute full performance of the guaranty of Agent in respect of the account so paid and thereupon Manufacturer shall assign all interest in such account to Agent.

Agent shall indemnify Manufacturer for all damages sustained in respect of hardboard lost, missing, or damaged while in custody of Agent as a result of the negligence of Agent.

16. Agent's Sales Efforts, etc.—Agent represents that at present it maintains and for a number of years it has maintained a nationwide organization, skilled and trained in the selling, distributing, and promoting the use of building materials. Agent agrees that at all times while this agreement remains in effect it will utilize such organization (consistent with its other business) actively to promote the sale of Manufacturer's hardboard products throughout the territory and to the classes of trade in which and to which Agent is authorized to sell hereunder.

17. Marking, etc.—All hardboard products of Manufacturer (or the packages, if wrapped) which Agent is authorized to sell or may sell hereunder, including samples, may be labelled with Agent's trade-marks or trade names, provided the labels clearly disclose that with respect thereto Agent is acting solely as agent for manufacturer. Neither Agent nor Manufacturer shall assert any right or interest in any trade-marks or trade names of the other by reason of the existence of this agency.

108 Manufacturer may mark its hardboard products (or the packages, if wrapped) sold by Agent with such patent notice as it may be advised by counsel is necessary for its protection, but no such marking shall in any manner deface such hardboard products nor in any manner differ from the markings so used by Manufacturer on such hardboard products sold by Manufacturer on orders obtained by Manufacturer's employees.

18. Samples.—Manufacturer shall supply Agent, without cost to Agent, Manufacturer's standard sized samples (cut to size only) of the various hardboard products which Agent is authorized to sell hereunder in such quantities as Manufacturer may reasonably determine are required to promote the sale by Agent of hardboard products for Manufacturer. Agent shall acquire no title or ownership in samples.

19. Patent Indemnity.—Manufacturer hereby warrants that the hardboard products which Agent is authorized to sell hereunder, when used for the general purposes for which such hardboard products are customarily designed or intended, will not infringe any United States Letters Patent not owned or controlled, either directly or indirectly, by Manufacturer; and Manufacturer will

save harmless and protect Agent, as well as Manufacturer's customers sold by Agent, against any claim or demand based on an alleged infringement of any such other United States Letters Patent. If Agent shall notify Manufacturer of the existence of such suit, Manufacturer shall appear and defend, at its own expense, any and all suits at law or in equity arising from such alleged infringement, provided always that Manufacturer shall have full control of the defense of any such suit.

20. Representation of Quality, etc.—Manufacturer agrees that all hardboard products in consignment stocks furnished to
109 Agent or delivered pursuant to orders obtained by Agent shall be of the grade and quality currently offered for sale by Manufacturer through its own employees to the classes of trade to which Agent is authorized to make sales.

21. Compensation.—For its services as Agent hereunder Manufacturer agrees to pay Agent compensation in respect of hardboard products sold by Agent at the rates set forth in Schedule A annexed hereto, and Agent, in making its remittances to Manufacturer, is authorized to deduct and retain the amounts of current commissions as provided in said Schedule.

22. Employee of Agent Not to be Employee of Manufacturer, etc.—Neither the making of this agreement, the acceptance of appointment of Agent hereunder, the performance of any of the provisions hereof, nor the making of any sales hereunder shall constitute or be construed as constituting any person employed by Agent an employee of Manufacturer for any purpose whatsoever.

Agent shall indemnify and hold Manufacturer harmless against all loss and costs sustained by reason of damages to persons or property resulting from the negligent handling by Agent of consignment stocks of hardboard, including reasonable attorneys' fees and disbursements which Manufacturer may incur in defending any claim asserted against Manufacturer for such damages.

23. Term.—The term of this agency shall commence as of the date hereof and continue until March 20, 1945, provided that said term shall be automatically extended from year to year thereafter, subject, however, to (a) termination at any time by either party for cause as defined in Paragraph 24 hereof, or (b) termination by Agent at any time prior to March 20, 1945, by giving to Manufacturer not less than six (6) months' previous written notice of its intention so to do, or (c) termination on March 20, 1945,
110 or anytime thereafter, by either Manufacturer or Agent upon giving to the other not less than six (6) months' previous written notice of intention so to do. In event of the termination of this agency by notice, as provided herein, Manufacturer will not be required to make shipments on sales made by Agent or

to Agent's consignment stocks at a rate in excess of Agent's average monthly shipments during the six months' period immediately preceding the receipt of the notice of termination.

24. Rights to Terminate.—Either party may terminate this Agreement by written notice to the other, upon the happening of any one or more of the following events:

(a) Failure of the other party to perform or comply with any of the provisions to be performed on its part hereunder; provided, however, that in event of unintentional or inadvertent default the party concerned shall have the right to prevent such cancellation from going into effect by correcting or discontinuing such default within thirty days of the date on which the notice of default was mailed to it;

(b) The insolvency, receivership, or bankruptcy of the other party or an assignment by the other party for the benefit of its creditors;

(c) The filing and approval of a petition for the reorganization of the other party under the provisions of Chapter X of the Bankruptcy Act as now in force or as hereafter amended or under any similar act for the relief of debtors.

25. Right of Assignment.—This agreement and the appointment of Agent hereunder is personal in character and neither this Agreement nor any of the rights, interests, privileges or obligations hereunder shall be assignable or transferable by Agent without the express written consent of Manufacturer first had and obtained. However, Manufacturer will consent to the assignment
111 hereof, together with all rights and interests hereunder, to such concern as shall acquire all or substantially all of the assets and going business of Agent, provided such assignee by written instrument shall accept appointment as successor agent hereunder, assume all obligations of Agent hereunder, and agree to be bound by all the terms and provisions hereof.

26. Superseding Previous Agency Agreements.—When this Agreement shall have been duly executed by the parties and delivered pursuant to authorization by each of the parties, this Agreement shall supersede in all respects the existing agreement between Manufacturer and Agent dated , 19 , and any supplement or supplements thereto, which said agreement and said supplements shall thereby be and become terminated in all respects, anything therein to the contrary notwithstanding.

In witness whereof, the parties have executed this Agreement this day of , 1941, although to be effective as of the date and year first hereinabove written.

MASONITE CORPORATION,

By ------ ------, *President.*

By ------ ------, *President.*

112 *Schedule A—Agent's Compensation Schedule*

Column No. 1 of the following Schedule sets forth the percentages of Manufacturer's Dealer Carlot Prices for the respective types and sizes of hardboard products at which Agent's current commissions shall be computed. Such computation shall be on said Dealer Carlot Prices in effect at the time of sale by Agent, and Agent will remit to Manufacturer only the entire difference between such Dealer Carlot Prices and the percentages thereof so computed, except that at the same time Agent makes a remittance to Manufacturer for hardboard products sold out of consignment stock Agent will also remit to Manufacturer an amount equal to the freight payments made by Manufacturer on account of the products so sold covering the original shipment of such products from Manufacturer's plant for such consignment stock.

Columns Nos. 2, 3, and 4 set forth the respective percentages by which the percentages appearing in Column No. 1 will be increased at the end of each of Manufacturer's fiscal years (August 31 of each year) and applied to the Dealer Carlot Prices in effect at the time of sale by Agent during such fiscal year if Agent's aggregate volume of sales for such year exceed 15,000,000 square feet, surface measurement, the applicable column to be determined by such aggregate volume of sales. Such excess annual commissions shall be computed and paid within sixty (60) days following the close of each such fiscal year.

With the exception of Manufacturer's hardboard products sold under its trade name of "Temprtile," no commission will be allowed on the increased Dealer Carlot Price of any hardboard product by reason of the fact that such product is tempered, and no commission will be allowed on the increased Dealer Carlot Price of any hardboard product by reason of the fact that such product is colored, dyed, primed, coated, or similarly processed or treated.

113 RATE OF COMPENSATION ON DIFFERENT ANNUAL SALES VOLUMES—SURFACE MEASUREMENT

	Base rate	Rates of additional compensation for quantity		
	No. 1 · up to 15 million sq. ft.	No. 2 15 to 20 million sq. ft.	No. 3 20 to 25 million sq. ft.	No. 4 over 25 million sq. ft.
Standards:				
¼" Presdwood	40%	1%	3%	4%
¼" Temprtile	40%	1%	3%	4%
5/16 Temprtile	40%	1%	3%	4%
5/16" Presdwood	43%	1%	3%	4%
¼" Presdwood	43%	1%	3%	4%
5/16" Presdwood	43%	1%	3%	4%
Quartrboard	36%	1%	1%	3%
Deluxe Quartrboard	36%	1%	1%	3%
5/16" Wallboard	36%	1%	1%	3%
Standards—Special sizes:				
5/16" Wallboard	29%	1%	1%	3%
All others	31%	1%	1%	3%

Service admitted as of April 10, 1941.

(S) STANLEY C. DISNEY.

114 In District Court of the United States for the Southern District of New York

[Title omitted.]

Answer of Johns-Manville Sales Corporation

The defendant Johns-Manville Sales Corporation (hereinafter called "this defendant") by Davis Polk Wardwell Gardiner & Reed, its attorneys, answers the complaint as follows:

The paragraphs of this answer are numbered to correspond with the paragraphs of the complaint; and for convenience this defendant has sometimes in this answer adopted the abbreviated names of the defendants as used in the complaint.

1. This defendant admits that the complaint is filed and that these proceedings are instituted under Section 4 of the Sherman Act and Section 15 of the Clayton Act and in order to pre-
115 vent alleged violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, but denies any violation or attempted violation of any of said Sections or of any other provision of the Federal Anti-Trust Laws.

2. It denies each and every allegation contained in paragraph 2 of the complaint, except that it admits that certain of the defendants (including this defendant) conduct their business and are found within the Southern District of New York and that hardboard is sold in interstate commerce in part within said District.

3. It admits that the defendant Masonite Corporation is a corporation organized and existing under the laws of the State of Delaware, having its principal sales office at Chicago, Illinois, and a manufacturing plant at Laurel, Mississippi, and that defendant Masonite is the largest manufacturer and distributor of hardboard in the United States. Except as hereinabove admitted, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the complaint.

4. It admits that the defendant The Celotex Corporation is a corporation organized and existing under the laws of the State of Delaware, with an office at Chicago, Illinois, and a manufacturing plant at Marrero, Louisiana, and that defendant Celotex is a large producer and distributor of fiber insulation board and other building materials and is a large distributor of hardboard in the United States. Except as hereinabove admitted, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of the complaint.

5. It admits that the defendant Certain-teed Products Corporation is a corporation organized and existing under the laws of the State of Maryland, with an office at New York City, New York,

that said defendant is a manufacturer and distributor of building materials, and that a certain contract dated October 29,
116 1936, between defendant Masonite and Hawaiian Cane Products, Ltd., was assigned to defendant Certain-teed Products in 1937. Except as hereinabove admitted, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5 of the complaint.

6. It admits the allegations contained in paragraph 6 of the complaint except that it denies that the defendant Johns-Manville Sales Corporation is a corporation organized in 1926 and existing under the laws of the State of New York, and avers that this defendant, Johns-Manville Sales Corporation, is a corporation organized in 1929 and existing under the laws of the State of Delaware, with an office at New York City, New York.

7. It admits that the defendant Insulite Company is a corporation organized and existing under the laws of the State of Minnesota, with an office at Minneapolis, Minnesota, and that said defendant distributes insulation board and other kinds of building materials. Except as hereinabove admitted, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7 of the complaint.

8. It admits that the defendant Flintkote Company is a corporation organized and existing under the laws of the State of Massachusetts, with an office at New York City, New York, and is engaged in the production and distribution of roofing materials and other types of building materials. Except as hereinabove admitted, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the complaint.

9. It admits that the defendant National Gypsum Company is a corporation organized and existing under the laws of the State of Delaware, with an office at Buffalo, New York, and is a
117 producer of gypsum products and a producer and distributor of other building materials. Except as hereinabove admitted, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 of the complaint.

10. It admits that the defendant Wood Conversion Company is a corporation organized and existing under the laws of the State of Delaware, with an office at Cloquet, Minnesota, but is without knowledge or information sufficient to form a belief as to whether this is the principal office of said defendant.

11. It admits that the defendant Armstrong Cork Company is a corporation organized and existing under the laws of the State of Pennsylvania, with an office at Lancaster, Pennsylvania, and

that said defendant is a producer of flooring materials and cork products used in building and also distributes fiber insulation board and other building materials. Except as hereinabove admitted, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11 of the complaint.

12. It admits that the defendant Dant & Russell, Inc., is a corporation organized and existing under the laws of the State of Oregon, with an office at Portland, Oregon, and that said defendant is a distributor of fiber insulation board. Except as hereinabove admitted, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 12 of the complaint.

13. It admits that hardboard is a patented product made of vegetable fiber, such as wood and woody type materials, and is used in the building and other industries as set forth in the first paragraph of paragraph 13 of the complaint. It admits that hardboard is of the general type and possesses general char-
118 acteristics as set forth in the first four sentences of the second paragraph of paragraph 13 of the complaint, and in the first sentence of the third paragraph of said paragraph 13. Except as hereinabove admitted, this defendant denies each and every allegation contained in paragraph 13 of the complaint.

14. It admits that the hardboard manufactured by defendant Masonite and distributed by this defendant is manufactured in approximately the manner set forth in paragraph 14 of the complaint. Except as hereinabove admitted, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 14 of the complaint.

15. It admits that the commercial production of hardboard was started at some time prior to 1933 and that defendant Masonite has been producing hardboard since that time up to and including the present. Except as hereinabove admitted, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 15 of the complaint.

16–17. It admits the allegations contained in paragraphs 16 and 17 of the complaint.

18–19. It is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 18 and 19 of the complaint.

20. It is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 20 to 29, inclusive, of the complaint, except that it admits that in 1931 Masonite instituted suit against The Celotex Company for

patent infringement in the United States District Court for the District of Delaware.

30. It admits that on October 19, 1932, the United States District Court for the District of Delaware, in an opinion
119 reported in 1 Fed. Supp. 494, held that The Celotex Company and its receivers had not infringed Masonite's patent No. 1,663,505, and that Masonite thereupon filed an appeal to the United States Circuit Court of Appeals for the Third Circuit.

31. It is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 31 of the complaint.

32. It admits that on July 6, 1933, the United States Circuit Court of Appeals for the Third Circuit, in an opinion reported in 66 F. (2d) 451, one judge dissenting without opinion, reversed the decision of the lower court referred to in paragraph 30 of the complaint and held that Masonite's patent No. 1,663,505 was valid and had been infringed by The Celotex Company. It admits that thereafter a petition for rehearing was filed by the receivers for The Celotex Company and was denied by the United States Circuit Court of Appeals for the Third Circuit on August 8, 1933, and that thereafter said receivers filed their petition for a writ of certiorari to the Supreme Court of the United States.

33. It is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 33 of the complaint, except that it denies that this defendant was at the time referred to therein a potential competitor of Masonite in the manufacture or distribution of hardboard.

34. With respect to the first sentence of paragraph 34 of the complaint, it admits that at the time therein referred to each of the defendants therein mentioned had selling agencies and facilities for the nation-wide distribution of building materials, but is without knowledge or information sufficient to form a belief as to the extent of such facilities as compared with those of defendant Masonite. It is without knowledge or information sufficient
120 to form a belief as to the truth of the allegations contained in the second and third sentences of paragraph 34 of the complaint, except that it denies that this defendant was at the time therein referred to in a position to distribute hardboard.

35. It is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 35 of the complaint.

36–40. It denies each and every allegation contained in paragraphs 36 to 40, inclusive, of the complaint.

41. It admits that after the decision of the Circuit Court of Appeals referred to in paragraph 32 of the complaint, and after the filing by the receivers of The Celotex Company of a petition

for a writ of certiorari to review that decision, Masonite and the receivers of The Celotex Company entered into negotiations and that as a result of these negotiations said parties on October 10, 1933, entered into two agreements, one entitled "Agency Agreement and License Option" and the other entitled "Supplemental Agreement," relating to the distribution of hardboard. Except as hereinabove admitted, it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 41 to 47, inclusive, of the complaint.

48. It denies each and every allegation contained in paragraph 48 of the complaint, except that it admits that the agreements therein mentioned were entitled "Agency Agreement and License Option" and "Supplemental Agreement," respectively.

49. It denies each and every allegation contained in paragraph 49 of the complaint.

50. It admits that on or about October 31, 1933, Masonite and National Gypsum entered into an agreement relating to the
121 distribution of hardboard, but is without knowledge or information sufficient to form a belief as to the exact terms of said agreement or as to the existence or nature of any understandings between National Gypsum and Masonite. Except as hereinabove stated it denies each and every allegation contained in paragraphs 50, 51, and 52 of the complaint.

53. It admits that under date of November 30, 1933, Masonite and this defendant entered into two agreements entitled "Agency Agreement and License Option" and "Supplemental Agreement," respectively, and for greater certainty refers to each of said original agreements with the same force and effect as if they were herein set forth at length. It alleges that each of said agreements has long since been cancelled and is no longer in force and effect. Except as hereinabove admitted, it denies each and every allegation contained in paragraphs 53 to 56, inclusive, of the complaint.

57. It admits that on or about the dates mentioned in paragraphs 57 to 67, inclusive, of the complaint, Masonite and the several parties therein mentioned entered into certain agreements relating to the distribution of hardboard, but is without knowledge or information sufficient to form a belief as to the exact terms of said agreements or as to the existence or nature of any understandings between Masonite and the other parties therein mentioned. Except as hereinabove stated, it denies each and every allegation contained in paragraphs 57 to 67, inclusive, of the complaint.

68. It is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 68 of the complaint.

69. It admits that on or about the dates mentioned in paragraphs 69 to 76, inclusive, of the complaint, Masonite and the

several parties therein mentioned entered into certain agreements relating to the distribution of hardboard, but is without
122 knowledge or information sufficient to form a belief as to the exact terms of said agreements or as to the existence or nature of any understandings between Masonite and the other parties therein mentioned. Except as hereinabove stated, it denies each and every allegation contained in paragraphs 69 to 76, inclusive, of the complaint.

77. If denies each and every allegation contained in paragraph 77 of the complaint in so far as the same relate to alleged representations or inducements by defendant Masonite to this defendant, and is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph with respect to alleged representations or inducements made by defendant Masonite to other defendants.

78-79. It denies each and every allegation contained in paragraphs 78 and 79 of the complaint.

80-81. It is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 80 and 81 of the complaint.

82. It denies each and every allegation contained in paragraph 82 of the complaint, except that it admits that as of October 29, 1936, Masonite entered into written agreements with the defendants named in said paragraph and that all prior agreements between Masonite and said defendants were cancelled.

83. It denies each and every allegation contained in paragraph 83 of the complaint, except that it admits that agreements were entered into between Masonite and the other defendants named therein as of October 29, 1936, and for certainty refers to the terms of such agreements with the same force and effect as if the same were herein set forth at length.

84-86. It denies each and every allegation contained in
123 paragraphs 84, 85, and 86 of the complaint, except that it admits that on January 30, 1937, Hawaiian Cane assigned to defendant Certain-teed the agreement referred to in paragraph 82 of the complaint, with the consent of Masonite.

87. It admits that on or about March 16, 1937, defendants Flintkote and Dant & Russell entered into agreements with defendant Masonite relating to the distribution of hardboard, but is without knowledge or information sufficient to form a belief as to the exact terms of said agreement or as to the existence or nature of any understandings between defendant Masonite and defendants Flintkote and Dant & Russell. Except as hereinabove stated, it denies each and every allegation contained in paragraphs 87 to 89, inclusive, of the complaint.

90. It denies each and every allegation contained in paragraph 90 of the complaint in so far as the same relate to or affect this defendant, except that it admits that this defendant has carried on the distribution of hardboard under and in accordance with the contracts from time to time in force between it and defendant Masonite, and denies that any of its acts in respect to the sale or distribution of hardboard have been or are unlawful, or pursuant to or a part of any combination or conspiracy or agreement in restraint of trade or commerce. It is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 90 of the complaint in so far as they relate to or concern the other defendants therein mentioned.

91. It denies each and every allegation contained in paragraph 91 of the complaint in so far as the same relate to or concern the acts of this defendant or dealings between this defendant and defendant Masonite, except that it admits that under the respective contracts in force between this defendant and Masonite, defendant Masonite (a) has manufactured hardboard and supplied the same on consignment to this defendant for distribution by it as factor under said contracts; (b) pursuant to said contracts has
124 fixed certain prices, terms and conditions of sale with respect to the sale by this defendant as factor of hardboard so manufactured by Masonite; (c) pursuant to said contracts has designated the classifications of customers to whom this defendant as factor might make sales of hardboard and has reserved to itself generally the exclusive sale of hardboard to the nonbuilding industries; and (d) has allowed this defendant commissions upon the sale by this defendant as factor of Masonite's hardboard ranging from 35% to 47% of its car lot prices to dealers, and that said commissions varied with the different types of hardboard and also with the amount of total annual sales made by this defendant as factor. It is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 91 of the complaint in so far as the same relate to dealings between defendant Masonite and the other defendants. It denies that any of this defendant's acts in respect to the distribution of hardboard have been or are unlawful.

92. It is without knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 92 and 93 of the complaint, except that it admits that defendant Masonite produces a substantial majority of all hardboard manufactured in the United States.

94. It denies each and every allegation contained in paragraph 94 of the complaint.

95–99. It is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 95 to 99, inclusive, of the complaint.

100. It denies each and every allegation contained in paragraph 100 of the complaint.

101. It denies each and every allegation contained in paragraph 101 of the complaint in so far as the same relate to or concern this defendant, and is without knowledge or information sufficient to form a belief with respect to the allegations of said paragraph in so far as the same relate to or concern the other defendants.

102. It denies each and every allegation contained in paragraph 102 of the complaint.

103. It denies each and every allegation contained in paragraph 103 of the complaint, except that it is without knowledge or information sufficient to form a belief as to the prices followed by United States Gypsum Company with respect to hardboard.

104. It is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 104 of the complaint, except that it admits that since 1928 the total volume of hardboard business has grown manifold.

105. It denies each and every allegation contained in paragraphs 105 and 106 of the complaint, except that it admits that del credere factor agreements are in force between Masonite and the other defendants, and for greater certainty it refers to the terms of said agreements with the same force and effect as if the same were here set forth at length.

107. It is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 107 of the complaint.

108–109. It denies each and every allegation contained in paragraphs 108 and 109 of the complaint.

126 Wherefore, defendant Johns-Manville Sales Corporation demands judgment that the complaint herein be dismissed as to it.

DAVIS POLK WARDWELL GARDINER & REED,
By (Sgd.) PORTER R. CHANDLER,
A Member of the Firm,
Attorneys for defendant Johns-Manville Sales Corporation,
15 Broad Street, Borough of Manhattan, City of New York.

127 In District Court of the United States for the Southern District of New York

[Title omitted.]

Supplemental Answer of Johns-Manville Sales Corporation

The defendant Johns-Manville Sales Corporation (hereinafter called "this defendant," by Davis Polk Wardwell Gardiner & Reed,

its attorneys, without prejudice to the matters heretofore set forth in its answer to the complaint herein, for its supplemental answer and as a separate affirmative defense, alleges:

1. Subsequent to the joinder of issue by service and filing of the answer of this defendant, this defendant and defendant Masonite Corporation duly executed an agency agreement in writing, dated March 20, 1941, in the form annexed as Exhibit A to the supplemental answer of defendant Masonite Corporation and said agreement is now in full force and effect and the parties are acting thereunder.

2. Prior to the execution and delivery of said agreement, counsel for the defendant Masonite Corporation and counsel for certain other defendants, including this defendant, presented to and filed with the Attorney General of the United States, copies
128 of the aforesaid form of new agreement; and counsel for defendant Masonite Corporation informed the Attorney General that said defendant was about to make new agreements in this form with each of the other defendants, respectively, and stated that defendant Masonite Corporation would be glad to be informed of any view or opinion by the Attorney General as to the legality or illegality, propriety or impropriety, of said proposed new agreement or any part thereof, in order that it might have the opportunity of considering revision or alteration of the new agreement to the extent reasonably possible. After examination of said proposed new agreement, the representatives of the Attorney General informed counsel for defendant Masonite Corporation and said other defendants that it would not be in accord with the policy of the Department of Justice to express in advance any view or opinion concerning the new agreement; that the defendants had a right to make any new agreement as to their respective businesses in accordance with law; and that after the new agreement was made by defendant Masonite Corporation with the other defendants, the Department would then determine its opinion and course with respect thereto and with respect to the effect of said new agreement if any, upon the present suit.

3. Said new agreement by its terms expressly supersedes the agreement, dated October 29, 1936, between this defendant and defendant Masonite Corporation, together with all supplements thereto and amendments thereof, referred to in the complaint, and said prior agreement, its supplements and amendments, are no longer in effect.

4. By reason of the foregoing, and without prejudice to the claim heretofore made by this defendant in its answer that neither said former agreement nor any act of this defendant has amounted to any violation of law, the issues presented by the complaint herein as regards this defendant have now become moot.

129 Wherefore, defendant Johns-Manville Sales Corporation demands judgment that the complaint herein be dismissed as to it.

DAVIS POLK WARDELL GARDINER & REED,
By PORTER R. CHANDLER,
A Member of the Firm,
Attorneys for Defendant Johns-Manville Sales Corporation, Office & Post Office Address: 15 Broad Street, Borough of Manhattan, City of New York.

Service of 5 copies is hereby admitted this 17th day of April 1941.
HUGH B. COX.

APRIL 17, 1941.

130 In United States District Court for the Southern District of New York

[Title omitted.]

Answer of the Flintkote Company

The defendant The Flintkote Company, sued herein as "Flintkote Company," answering the Complaint herein, by Sullivan & Cromwell, its attorneys:

I. Admits that the Complaint herein is filed and these proceedings are instituted under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act
131 to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," said act being commonly known as the "Sherman Antitrust Act," and under Section 15 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 730, as amended, said act being commonly known as the "Clayton Act"; denies that the defendant The Flintkote Company has committed or is committing any violation of any of the provisions of the said Statutes; and in all other respects denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraph 1 of the Complaint.

II. Admits the allegations of the last two sentences of paragraph 2 of the Complaint; denies each and every other allegation of paragraph 2 of the Complaint in so far as the same is intended to refer to this defendant, The Flintkote Company; and in all other respects denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraph 2 of the Complaint.

III. Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraphs 3, 4, 5, 6, and 7 of the Complaint.

IV. Denies each and every allegation of paragraph 8 of the Complaint, except that it admits and alleges that the defendant The Flintoke Company is a corporation organized and existing under the laws of the Commonwealth of Massachusetts, with its principal office at New York City, New York; that for many years during a period prior to 1930, this defendant was primarily engaged (apart from the business of its subsidiaries) in the production and distribution of roofing materials; that more recently this defendant has also engaged in the production
132 and distribution of other types of building materials and of other types of materials not classifiable as building materials.

V. Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraphs 9, 10, 11, and 12 of the Complaint.

VI. Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraphs 13 and 14 of the Complaint, except that it admits that the allegations thereof describing the nature, characteristics, uses, and methods of manufacture of hardboard are approximately correct general descriptions.

VII. Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraph 15 of the Complaint.

VIII. Admits the allegations of paragraphs 16 and 17 of the Complaint.

IX. Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraphs 18, 19, 20, 21, 22, 23, and 24 of the Complaint.

X. Admits the allegations of paragraph 25 of the Complaint.

XI. Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraphs 26, 27, 28, and 29 of the Complaint.

XII. Admits the allegations of paragraph 30 of the Complaint.

133 XIII. Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraph 31 of the Complaint.

XIV. Admits the allegations of paragraph 32 of the Complaint.

XV. Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraph 33 of the Complaint.

XVI. Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraph 34

of the Complaint, except that it denies that, at the time referred to in said paragraph of the Complaint, this defendant had selling agencies for the distribution of building materials, and except that it admits that this defendant had selling facilities for nation-wide distribution of building and other materials.

XVII. Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraph 35 of the Complaint.

XVIII. Denies each and every allegation of paragraph 36 of the Complaint in so far as the same is intended to refer to this defendant, The Flintkote Company; and in all other respects denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraph 36 of the Complaint.

XIX. Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraph 37 of the Complaint.

134 XX. Denies each and every allegation of paragraphs 38, 39, and 40 of the Complaint in so far as the same are intended to refer to this defendant, The Flintkote Company; and in all other respects denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraphs 38, 39, and 40 of the Complaint.

XXI. Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraphs 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, and 67 of the Complaint.

XXII. Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraph 68 of the Complaint, except that it admits that on March 3, 1934, Masonite Corporation instituted suit in the District Court for the Northern District of Pennsylvania against the Faxon Lumber Company of Williamsport, Pennsylvania for infringement of Masonite Corporation's U. S. Patent No. 1,663,505.

XXIII. Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraphs 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, and 86 of the Complaint.

XXIV. Denies each and every allegation of paragraph 87 of the Complaint, except that it admits that prior to March 16, 1937, this defendant, as a selling agent of The Insulite Company, has been distributing hardboard manufactured by Masonite Corporation, and that on March 16, 1937, this defendant entered into

135 an agreement with Masonite Corporation, for the full and precise terms and conditions of which this defendant asks leave to refer to the original thereof with the same force and effect

as if here set out at length; and except that it denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraph 87 of the Complaint in so far as they are intended to refer to the defendant Dant & Russell, Inc.; and further answering paragraph 87 of the Complaint, and the other allegations of the Complaint, this defendant alleges:

Prior to 1930 The Flintkote Company was primarily engaged (apart from the business of certain of its subsidiaries) in manufacturing and selling roofing materials and industrial emulsions. From time to time, in the period between 1925 and 1937, and in accordance with a policy to increase and diversify its sales line, The Flintkote Company added various items to its sales line, principally modifications and improvements of existing items, but also including such general building supply items as rock wool and "insulation board" or "softboard" (a fibre composition board weighing less than 25 to 30 lbs. per cubic foot, and commonly used for purposes other than the purposes for which hardboard is used).

Among other reasons, a principal reason for the said diversification of The Flintkote Company's sales line was that many customers of The Flintkote Company were building supply wholesalers and jobbers who, it was observed and believed by The Flintkote Company, preferred to deal with suppliers able to offer well diversified lines, for, among other reasons, the following reasons: (a) If items required by such a customer at any one time, aggregating a carload or more, are purchased from several different
136 sources, the purchases result in several different shipments, each of which may be less than a carload, whereas, if all or many of the items can be obtained from a single source, the shipment may be made in whole or in part at the lower carload freight rates, and other economies in handling costs may be realized, resulting in a lower gross cost of the goods; and (b) When such a customer is able to provide for many of his requirements by a single interview with one salesman, he conserves his time which he may more profitably employ in his selling efforts. Accordingly, The Flintkote Company considered that a well balanced diversification of its sales line would improve the success of its business and result in a lower cost to the ultimate consumer of all items sold by The Flintkote Company.

The Flintkote Company began the distribution of softboard, as a part of its sales line, in March, 1935. Many of the purchasers to whom The Flintkote Company wished to sell softboard also had requirements for hardboard. For the reasons above stated, The Flintkote Company considered it to be essential and important to the success of its sales line that it should be able to supply its customers with a product in character and usefulness substantially

identical with the hardboard distributed by Masonite Corporation and its agents.

The Flintkote Company knew that the validity of Masonite Corporation's basic patent had been sustained by a Circuit Court of Appeals of the United States and knew of no reason to believe, and did not believe, that Masonite Corporation's patents were in any respect invalid. The Flintkote Company had not discovered nor devised any method or process for the practicable manufacture of a non-infringing and competitive product.

137 Having been unable to discover any alternative method of obtaining or producing a product to compete successfully with Masonite Corporation's hardboard, in April 1935 The Flintkote Company began the distribution of that hardboard as a selling agent for the Insulite Company which, The Flintkote Company was advised, obtained the same from Masonite Corporation. In 1937 The Flintkote Company approached Masonite Corporation with a view to dealing directly with Masonite Corporation, and learned that Masonite Corporation would be willing to permit The Flintkote Company to handle its hardboard only as an agent of Masonite Corporation and under the terms and conditions of agency set forth in the said agreement which The Flintkote Company entered into on March 16, 1937. The only interest of The Flintkote Company in entering into the said agreement was to obtain a source of supply of hardboard, which it considered essential as an adjunct to its sales line, and none of the restrictive terms and conditions of the said agreement was suggested by The Flintkote Company; on the contrary all of the restrictive terms and conditions of the said agreement were required by Masonite Corporation for the purpose, as The Flintkote Company was informed and believed, of protecting and preserving the benefit to Masonite Corporation of its exclusive ownership of the hardboard patents. All of the terms and conditions of agreement between The Flintkote Company and Masonite Corporation are set forth in writing in the said agreement dated March 16, 1937, and The Flintkote Company is not and has not been a party to any agreement or understanding whatsoever with Masonite Corporation or any other person relating to hardboard or the distribution thereof, except as herein admitted and alleged.

138 The Flintkote Company entered into the said agreement with Masonite Corporation for the reasons and purposes set forth above, and for no other reasons or purposes and with no other motives or intentions, and knew of no reason to believe, and did not believe, that said agreement was in any respect in violation of any of the laws of the United States or otherwise illegal or invalid, and knew of no reason to believe, and did not believe, that said agreement was entered into by Masonite Corpora-

tion pursuant, on its part, to any agreement with others or pursuant to any unlawful scheme or purpose.

XXV. Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraph 88 of the Complaint in so far as the same are intended to refer to an alleged agreement entered into by Dant & Russell, Inc.; denies that it has any knowledge or information sufficient to form a belief as to similarities and differences between the agreement entered into by this defendant, The Flintkote Company, and the other alleged agreements referred to in the Complaint; and in all other respects denies each and every allegation of paragraph 88 of the Complaint, except that it admits that an agreement was entered into between this defendant and Masonite Corporation on March 16, 1937, for the full and precise terms and conditions of which this defendant asks leave to refer to the original thereof with the same force and effect as if here set out at length.

XXVI. Denies each and every allegation of paragraph 89 of the Complaint in so far as the same is intended to refer to this defendant, The Flintkote Company; and in all other respects
139 denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraph 89 of the Complaint.

XXVII. Denies each and every allegation of paragraph 90 of the Complaint in so far as the same is intended to refer to this defendant, The Flintkote Company, except that it admits that since March 16, 1937, it has not distributed or sold hardboard otherwise than as an agent of Masonite Corporation and pursuant to and in accordance with the terms of the said agreement of that date, and that it has at no other time distributed or sold hardboard except as in paragraph XXIV of this Answer admitted and alleged; and in all other respects denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraph 90 of the Complaint.

XXVIII. Denies each and every allegation of paragraph 91 of the Complaint, in so far as the same is intended to refer to this defendant, The Flintkote Company, except that it admits that continuously since March 16, 1937, (a) Masonite Corporation has manufactured hardboard which has been distributed and sold by this defendant as agent for Masonite Corporation, (b) Masonite Corporation has, by the said agreement between Masonite Corporation and this defendant, and to the extent therein agreed and provided, fixed the prices, terms and conditions of sale by which this defendant has made sales of hardboard as agent for Masonite Corporation, (c) Masonite Corporation has, by the said agreement, and to the extent therein agreed and provided, designated certain classifications of customers to whom this defendant, as agent for

Masonite Corporation, may make sales of the hardwood covered by the said agreement, and (d) Masonite Corporation has, by the said agreement, and to the extent therein agreed and provided, granted to this defendant certain commissions for its services as such agent; and in all other respects denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraph 91 of the Complaint.

XXIX. Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraphs 92 and 93 of the Complaint.

XXX. Denies each and every allegation of paragraph 94 of the Complaint in so far as the same is intended to refer to this defendant, The Flintkote Company; and in all other respects denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraph 94 of the Complaint.

XXXI. Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraphs 95, 96, 97, 98, and 99 of the Complaint.

XXXII. Denies each and every allegation of paragraphs 100, 101, and 102 of the Complaint in so far as the same are intended to refer to this defendant, The Flintkote Company; and in all other respects denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraphs 100, 101, and 102 of the Complaint.

XXXIII. Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraphs 103 and 104 of the Complaint.

XXXIV. Denies each and every allegation of paragraph 105 of the Complaint in so far as the same is intended to refer to this defendant, The Flintkote Company; and in all other respects denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraph 105 of the Complaint.

XXXV. Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraph 106 of the Complaint, except that it denies that the characterizations set forth in subdivisions (a) to (l), inclusive, of paragraph 106 of the Complaint, correctly describe or summarize the said agreement of March 16, 1937, entered into by this defendant, The Flintkote Company, for the full and precise terms and conditions of which this defendant asks leave to refer to the original thereof with the same force and effect as if here set out at length.

XXXVI. Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraphs 107 and 108 of the Complaint.

XXXVII. Denies each and every allegation of paragraph 109 of the Complaint in so far as the same is intended to refer to this defendant, The Flintkote Company; and in all other respects denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraph 109 of the Complaint.

WHEREFORE, this defendant demands that the Complaint of the plaintiff herein be dismissed as against this defendant, The Flintkote Company.

SULLIVAN & CROMWELL,
48 Wall Street, New York, N. Y.,
Attorneys for Defendant The Flintkote Company.

ALLEN W. DULLES,
WILLIAM PIEL, JR.,
48 Wall Street, New York, N. Y.;
Of Counsel.

142 [*Duly sworn to by George K. McKenzie; jurat omitted in printing.*]

Copy received 5/13/40.

SAMUEL S. ISSEKS,
Special Assistant to the Attorney General.

143 In United States District Court for the Southern District of New York

[Title omitted.]

Supplemental answer of The Flintkote Company

The defendant The Flintkote Company, sued herein as "Flintkote Company," as its supplemental answer to the complaint herein, and as a complete, separate and affirmative defense, and as a partial defense, by Sullivan & Cromwell, its attorneys, alleges:

FIRST. As of March 20, 1941, and after the date of the serving and filing of its answer herein, verified the 13th day of May
144 1940, this defendant entered into an agreement (hereinafter referred to as "the new agreement") with defendant Masonite Corporation, a true copy of the form of which is annexed as "Exhibit A" to the supplemental answer of defendant Masonite Corporation herein. The said agreement was duly executed in duplicate by this defendant and defendant Masonite Corporation, and for the full and complete terms thereof this defendant prays leave to refer to the said "Exhibit A" annexed to the supplemental answer of defendant Masonite Corporation, with the same force and effect as if herein set forth at length.

SECOND. Said new agreement in all respects terminated and superseded as of March 20, 1941, the agreement dated March 16,

1937 between this defendant and defendant Masonite Corporation, which prior agreement is referred to in the complaint herein and in the answer of this defendant. This defendant and defendant Masonite Corporation are now acting under the said new agreement, and there is no agreement or understanding whatsoever between this defendant and defendant Masonite Corporation or any other person relating to hardboard or the distribution thereof otherwise than as expressly set forth and provided in the said new agreement. It is the purpose and intent of this defendant to observe fully and completely in letter and in spirit and in the utmost good faith all of the terms and conditions and provisions of the said new agreement, and this defendant asserts and affirms that it does not have any intention at any future time to reinstate the pre-existing agreement cancelled and terminated by the said new agreement.

THIRD. This supplemental answer is made by this defendant as an addition to its original answer herein and not in lieu
145 thereof, and without withdrawing, altering or qualifying in any respect whatever any of the denials or allegations made by this defendant in its original answer, all of which denials and allegations are hereby expressly reaffirmed and realleged. This defendant entered into the said new agreement for the reason that the said new agreement, proposed to this defendant by defendant Masonite Corporation, appeared in the judgment of this defendant to provide satisfactory and practicable terms on which this defendant might continue to supply hardboard to its customers as an adjunct to its sales line, in certain respects more convenient and advantageous to this defendant than the terms of the agency agreement theretofore existing between this defendant and defendant Masonite Corporation, and for the reason that defendant Masonite Corporation was unwilling to enter into any other or different type of agreement satisfactory to this defendant respecting the distribution by this defendant of the hardboard manufactured by defendant Masonite Corporation which this defendant believes to be validly patented.

Wherefore, this defendant demands that the complaint of the plaintiff herein be dismissed as against the defendant The Flintkote Company.

SULLIVAN & CROMWELL,
48 Wall Street, New York, N. Y.,
Attorneys for Defendant The Flintkote Company.

ALLEN W. DULLES,
WILLIAM PIEL, JR.,
48 Wall Street, New York, N. Y.,
Of Counsel.

Duly sworn to by George K. McKenzie; jurat omitted in printing.

146 In District Court of the United States for the Southern District of New York

[Title omitted.]

Answer of the Celotex Corporation

Now comes The Celotex Corporation, hereinafter sometimes referred to as "defendant" and "this defendant," and for answer to the complaint of the plaintiff filed herein admits, denies and avers as hereinafter set forth. For brevity and convenience in reference it adopts for the purposes of this answer the short names of the co-defendants in this cause as used by the plaintiff in the complaint, except where use of such short names might be confusing and it is necessary to distinguish between a predecessor and a successor corporation.

PART FIRST. Answering generally the complaint, this defendant denies that it ever entered into, or in any manner became a party to, any agreement, combination or conspiracy of
147 any kind whatsoever in violation of the antitrust laws or any other laws of the United States, and denies that it is or ever has been a party to any unlawful agreement, combination or conspiracy in restraint of trade or otherwise; and specifically denies any violation or attempted violation in any manner whatsoever of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act or either or any of them.

PART SECOND. Further answering the complaint, with the paragraphs of Part Second of this answer numbered to correspond with the paragraph numbers in the complaint:

1. Defendant admits that the complaint is filed and that these proceedings are instituted under Section 4 of the Sherman Anti-Trust Act and under Section 15 of the Clayton Act in order to prevent alleged violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act; but denies any violation or attempted violation in any manner whatsoever of said Sections 1 and 2 of the Sherman Act and said Section 3 of the Clayton Act or either or any of them.

2. Defendant denies each and every averment contained in paragraph 2 of the complaint except that it admits that certain of the defendants conduct their business and are found within the Southern District of New York and that hardboard is sold in interstate commerce within said District.

3. Defendant admits that Masonite Corporation is a corporation organized and existing under the laws of the State of Delaware, with its prinicipal office at Chicago, Illinois, and that it has its manufacturng plant at Laurel, Mississippi. Defendant

is informed that said corporation was organized in 1925 as Mason Fibre Company, and that in 1928 the corporate name
148 thereof was changed by amendment of its certificate of incorporation to Masonite Corporation. Defendant admits that defendant, Masonite Corporation, owns a number of patents relating to hardboard and to machinery or processes for the production of hardboard.

4. Defendant admits that it, The Celotex Corporation, is a corporation organized and existing under the laws of the State of Delaware; that it maintains a business office in the City of Chicago, Illinois; that its largest manufacturing plant is located at Marerro, Louisiana; that it was organized in 1935 as the corporation to acquire the assets and business of The Celotex Company, a corporation which was being reorganized in proceedings then pending under Section 77B of the Bankruptcy Act in the District Court of the United States for the District of Delaware as hereinafter more particularly set forth. Defendant further admits that it is one of the largest producers and distributors of structural insulation materials and that, as del credere agent for Masonite Corporation, it is one of the largest distributors of hardboard in the United States. Defendant further admits that it is the owner of approximately 23.6% of the common stock of the defendant, Certain-teed Products Corporation. Defendant denies each and every averment contained in paragraph 4 of the complaint except as hereinbefore in this paragraph admitted.

5. Defendant admits that Certain-teed Products Corporation is a corporation organized and existing under the laws of the State of Maryland and maintains an office in the City of New York, New York; admits that the del credere agency contract dated October 29, 1936, between Masonite Corporation and Hawaiian Cane Products, Ltd., was assigned to said defendant Certain-teed Products Corporation in 1937; admits that the defendant, Certain-teed Products Corporation, is an important manufacturer of roof-
149 ing materials, various gypsum products and certain types of noninsulating wallboards; but denies each and every averment contained in paragraph 5 of the complaint except as hereinbefore in this paragraph admitted.

6. Defendant admits that Johns-Manville Corporation is one of the largest manufacturers of roofing insulation and allied building materials, and is advised that Johns-Manville Sales Corporation sells products manufactured by Johns-Manville Corporation and, in addition, sells building materials manufactured by nonaffiliated companies; but defendant is without knowledge or information sufficient to form a belief as to the truth of the other averments contained in paragraph 6 of the complaint.

7. Defendant admits that Insulite Company is a corporation organized and existing under the laws of the State of Minnesota, with an office located at Minneapolis, Minnesota, and admits that the defendant, Insulite Company, manufactures fibre insulation board; but defendant is without knowledge or information sufficient to form a belief as to the truth of the other averments contained in paragraph 7 of the complaint.

8. Defendant admits that The Flintkote Company has for many years been engaged in the production and distribution of roofing materials, and more recently also in the distribution of other types of building materials, but defendant is without knowledge or information sufficient to form a belief as to the truth of the other averments contained in paragraph 8 of the complaint.

9. Defendant admits that National Gypsum Company is one of the most important producers of gypsum products, but defendant is without knowledge or information sufficient to form a belief as to the truth of the other averments contained in paragraph 9 of the complaint.

10. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 10 of the complaint.

11. Defendant admits that Armstrong Cork Company for many years has been one of the important producers of flooring materials and cork products, and has recently expanded its activities to include the distribution of insulation board; but defendant is without knowledge or information sufficient to form a belief as to the truth of the other averments contained in paragraph 11 of the complaint.

12. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 12 of the complaint.

13. Defendant denies each and every averment contained in paragraph 13 of the complaint, except that it admits that it is advised that statements therein descriptive of hardboard are generally correct if confined to the products manufactured by Masonite Corporation. Defendant avers that the allegedly registered trade-mark for hardboard manufactured by Masonite Corporation weighing approximately 30 pounds per cubic foot is "Quartrboard" and the allegedly registered trade-mark for hardboard manufactured by Masonite Corporation weighing approximately 60 pounds per cubic foot is "Presdwood." Defendant avers that hardboard claimed to be a patented product invented by William H. Mason is made of fibre as exemplified by wood and woody type materials and as outlined in paragraph 14 of this answer and is used in the building industry and for industrial uses substantially as averred in paragraph 13 of the complaint.

14. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 14 of the complaint, except that it admits that defendant Masonite Corporation manufactures hardboard on ma-
151 chines and by processes which are generally as therein described, and avers that it is advised by Masonite Corporation that the process is so operated as to cause the fibre to be compressed and to be cemented together by the natural encrustants or lignins of the wood into a hard, dense, grainless, homogeneous product of high tensile strength and great resistance to penetration by moisture.

15. Defendant admits that the commercial production of hardboard was started in 1926 by Mason Fibre Company, at Laurel, Mississippi, but denies that the assets of said Mason Fibre Company were taken over in 1928 by any other corporation, and avers that Mason Fibre Company is the same corporation as the defendant Masonite Corporation, its name having been duly changed in 1928 to Masonite Corporation. This defendant is advised that Masonite Corporation was the only concern engaged in the commercial production of hardboard in this country prior to 1929.

16. Defendant admits the averments contained in paragraph 16 of the complaint.

17. Defendant admits the averments contained in paragraph 17 of the complaint.

18. Defendant admits that The Celotex Company, its predecessor, in the February 1929 issue of its publication entitled "The Celotex News," announced its intention to engage in the production and distribution of a new product having the principal characteristics, so far as use was concerned, claimed by Masonite for its own product; and avers that such product was, for the time being, designated as "hard panel board," but denies each and every averment contained in paragraph 18 of the complaint except as in this paragraph admitted.

19. Defendant admits the averments contained in paragraph 19 of the complaint.

20. Defendant admits the averment contained in the
152 first sentence of paragraph 20 of the complaint. Defendant is without knowledge or information sufficient to form a belief as to whether the hardboard produced in its plant at Marrero, Louisiana, having reference to the nature, quality, and use of the product, was marketed at prices below those at which Masonite sold its products.

21. Defendant admits the averments contained in paragraph 21 of the complaint.

22. Defendant admits the averments contained in paragraph 22 of the complaint.

23. Defendant admits the averment contained in paragraph 23 of the complaint.

24. Defendant admits that during the period from 1929 to 1931 it continued the production and distribution of hardboard, but avers that it is without knowledge or information sufficient to form a belief as to whether, having reference to the nature, quality, and uses of its products, the prices therefor were substantially below those of defendant, Masonite Corporation, for comparable products. Except as admitted in this paragraph, defendant denies the averments contained in paragraph 24 of the complaint.

25. Defendant admits the averment contained in paragraph 25 of the complaint.

26. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment contained in paragraph 26 of the complaint.

27. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment contained in paragraph 27 of the complaint.

28. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 28 of the complaint.

29. Defendant is advised that during the year 1932 the
153 defendant, Insulite Company, commenced the production of a hardboard and that the same was marketed under Insulite's trade name, and is further advised that the hardboard produced by Insulite Company was sold to the building trade and also to industrial buyers, but is without knowledge or information sufficient to form a belief as to the truth of the other averments contained in paragraph 29 of the complaint.

30. Defendant admits the averments contained in paragraph 30 of the complaint.

31. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment contained in paragraph 31 of the complaint.

32. Defendant admits the averments contained in paragraph 32 of the complaint.

33. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 33 of the complaint except that defendant admits that at the time that the Receivers for The Celotex Company filed their petition for a writ of certiorari said Receivers were manufacturing and selling a hardboard in competition with hardboard manufactured and sold by Masonite Corporation.

34. Defendant admits that subsequent to the filing of the petition for a writ of certiorari referred to in paragraph 32 of the complaint, the defendants, The Celotex Corporation, The Flint-

kotē Company, Johns-Manville Sales Corporation, National Gypsum Company, Insulite Company, and Certain-teed Products Corporation, had selling agencies and facilities for the nationwide distribution of building materials and that said defendants last above named were in a position to distribute hardboard on a nationwide scale in the event that they were lawfully entitled to manufacture the same or were able to acquire such
154 hardboard from other companies having the right to manufacture the same and to distribute the same through them. Defendant denies, however, that it was in a position to either manufacture or distribute hardboard save in so far as it was able to secure the permission of the Masonite Corporation so to do, and expressly avers that as a result of the decision of the Circuit Court of Appeals for the Third Circuit it was prevented from further engaging in either the manufacture or distribution of hardboard except in so far as said mandate was stayed during the pendency of said petition for a writ of certiorari. Except to the extent that the averments contained in paragraph 34 of the complaint are admitted in this paragraph, defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in said paragraph.

35. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment contained in paragraph 35 of the complaint.

36. Defendant denies each and every averment contained in paragraph 36 of the complaint.

37. Defendant denies each and every averment contained in paragraph 37 of the complaint.

38. Defendant denies each and every averment contained in paragraph 38 of the complaint.

39. Defendant denies each and every averment contained in paragraph 39 of the complaint.

40. Defendant denies each and every averment contained in paragraph 40 of the complaint.

41. Defendant denies each and every averment contained in paragraph 41 of the complaint except as hereinafter in this paragraph specifically admitted.

Defendant avers that as the result of the depressed conditions which began in the fall of 1929 and which
155 affected not only the building industry, but business generally throughout the United States, The Celotex Company, whose assets and business were later acquired by this defendant, suffered a severe decline in demand for its products and sustained large operating losses. It also incurred heavy expenses and obligations in connection with its efforts successfully to defend itself against the patent litigation instituted against it by Masonite

Corporation. As a result of this decline in its business, the operating losses sustained by it and the heavy expenditures incurred in defense of such patent litigation, as well as other causes beyond its control, its affairs became so involved that in June of 1932 a complaint was filed by one of the creditors of The Celotex Company in the District Court of the United States for the District of Delaware, seeking the protection and preservation of the property, business and assets of the corporation, the appointment of Receivers to take over and conduct the business and affairs of the corporation under the direction of said Court and the liquidation of the corporation. On June 16, 1932, after a full hearing in respect of such matter, the Honorable John P. Nields, Judge of the District Court of the United States for the District of Delaware, entered a decree of said Court, ordering, adjudging and decreeing that the complainant in that suit was entitled to the relief prayed for; that it was necessary, for the protection and preservation of the respective rights in equity of the complainant and other creditors of The Celotex Company, that its properties and assets should be administered by the District Court of the United States for the District of Delaware, through a receiver or receivers appointed by that Court, and in and by such decree said Court appointed Colin C. Bell, of Wilmington, Delaware, and Hobart P. Young,
of Chicago, Illinois, as Receivers of and for The Celotex
156 Company and also of all of its property, assets and business of every kind and character; and ordered such Receivers to take possession of all of the estates, effects and assets of said The Celotex Company and manage the same in accordance with the orders of said Court and to carry on, continue, manage and operate the business of the defendant with full power and authority to continue such operations, to buy and sell merchandise and supplies, and to carry out and perform and fulfill contracts and obligations, to enter into new contracts incidental to the operation of its business, and to appoint and employ such managers, agents and employees and the like as might be necessary to carry on and conduct such business, such operation of the business of the corporation as a going concern, however, to continue subject to the further orders of such court and the Receivers' authority to make contracts being subject to the approval of such Court; and enjoined said The Celotex Company, its officers, directors and stockholders from in any manner conducting any of the business of The Celotex Company, or from receiving or collecting any money due it, or from taking any of its property or assets, or from taking part in or in any manner interfering with the business of The Celotex Company or of the Receivers so appointed by said Court. As the result of said decree, The Celotex Company, and the officers, directors, stockholders, and creditors of The Celotex Company, as

well as all of its employees, were effectively excluded as such from having anything to do with the conduct or operation of the business and affairs of said The Celotex Company. Said Receivers entered into possession of the property and assets of The Celotex Company, pursuant to the order and direction of said District Court of the United States for the District of Delaware, so taking charge of the assets and business of The Celotex Company, and from that time until February 8, 1935, the affairs and busi-
157 ness of The Celotex Company were, in each and every respect, managed, controlled and conducted exclusively by the District Court of the United States for the District of Delaware, and by the Receivers, acting under the direction and subject to the exclusive control of said Court. During all of said period of time no transactions pertaining to the assets, business and affairs of said The Celotex Company were carried on or participated in, in any manner, by said The Celotex Company or its officers, directors, employees or stockholders as such, save and except to the extent that efforts were made by them to promulgate and carry out a reorganization of said The Celotex Company in accordance with the customs and usages in cases of similar character pending in a Federal Court of equity.

Said receivership in the District Court of the United States for the District of Delaware extended from June 16, 1932, to February 8, 1935. On February 8, 1935, the United States District Court for the District of Delaware, sitting as a court of bankruptcy in connection with the proceedings in said Court entitled "In the Matter of The Celotex Company, Debtor, in Proceedings for Reorganization under Section 77B of the Bankruptcy Act, No. 1080," appointed Colin C. Bell, of Wilmington, Delaware, and William Tracy Alden, of Chicago, Illinois, Trustees of the estate of The Celotex Company, and thereupon the active conduct of the affairs and business of The Celotex Company was taken over by said Court through said Trustees. Defendant avers that during the entire period of said receivership, the Honorable John P. Nields, the sole presiding Judge of said District Court of the United States for the District of Delaware, was in charge of said cause, and the Receivers of The Celotex Company so appointed by said Court and by him as the Judge thereof on June 16, 1932, carried
158 on and conducted the business and affairs of The Celotex Company in all respects subject to the direction and control of said Court presided over as aforesaid; and that in the course of the conduct of said receivership said Receivers appointed by said Court regularly reported to said Court with respect to their conduct of the business and affairs of The Celotex Company and received the advice, instructions and directions of said Judge of said Court, which advice, instructions and directions were the

advice, instructions and directions of said District Court of the United States for the District of Delaware. By reason of the manifold operating problems which confronted said Receivers in connection with the conduct and operation of the affairs and business of The Celotex Company and the presentation by said Receivers of said problems from time to time to said Court, said Court became and was familiar in a detailed way with the problems and affairs of The Celotex Company.

The patent suit referred to in paragraph 25 of the complaint herein, instituted on April 2, 1931, by Masonite Corporation against The Celotex Company, in the District Court of the United States for the District of Delaware, did not come on to be heard before said Court until after the above mentioned receivership proceedings involving The Celotex Company were actively pending in said District Court of the United States for the District of Delaware, and the defense of said patent litigation, during the entire time that the same was pending therein, was conducted solely by said Receivers and their counsel, and said patent litigation was heard before the said Honorable John P. Nields, Judge of the District Court of the United States for the District of Delaware, the same Judge and the same Court having direct charge of the conduct of said receivership proceedings.

159 Upon the Circuit Court of Appeals for the Third Circuit having reversed the decision of Judge Nields, referred to in paragraph 30 of the complaint, holding that The Celotex Company had not infringed Masonite's patent, and the petition of the Receivers of The Celotex Company for a rehearing having been denied, the Receivers (neither of whom was or had been at any time an officer of The Celotex Company and each of whom owed his entire duty and fealty to the District Court of the United States for the District of Delaware), in good faith and with honest intent and with a view to fully and properly discharging their duties as such Receivers, conferred with the patent counsel who were representing them in the defense of such patent litigation, with respect to the possibility of the Receivers being able to procure the granting by the Supreme Court of the United States of a petition for a writ of certiorari, which had been addressed to the Supreme Court of the United States and filed in said Court, seeking a review of said decision of the Circuit Court of Appeals for the Third Circuit. Such Receivers were advised by able and learned counsel that such counsel had grave doubts whether such petition for a writ of certiorari would be granted and that serious consequences would result from the denial of the writ and the issuance of the mandate of the Circuit Court of Appeals for the Third Circuit, in that upon the issuance of

such mandate such Receivers and The Celotex Company, its successors and assigns, would stand enjoined from continuing the manufacture of hardboard and the supplying of their customers with hardboard, and that the assets and estate being administered by the Receivers would become subject to payment of large damages for past infringements for which said Circuit Court of Appeals had directed an accounting to be made. During said receivership the business of The Celotex Company had been operated at a heavy loss. Hundreds of thousands of dollars of expense had been incurred in connection with the receivership and
160 such patent litigation. It was also inevitable that, unless some practical arrangements could be worked out whereby the Receivers would be able to supply the established customers of the business being operated by them with hardboard, further loss of business would be suffered on account of the inability of the Receivers to ship to their customers hardboard and structural insulation in mixed car shipments. Faced with this situation, the Receivers, in an effort properly to discharge their duties, carried on negotiations with Masonite Corporation to endeavor to secure a license under its patents or to effect some practical arrangement which would prevent these serious consequences, and were finally able to negotiate the agreement of October 10, 1933, entitled "Agency Agreement and License Option" (sometimes hereinafter referred to as "Agency Agreement") and the agreement entitled "Supplemental Agreement." These agreements were the only arrangement which the Receivers were able to make with Masonite Corporation. Having negotiated said agreements in draft form, said Receivers applied to the District Court of the United States for the District of Delaware and to the Honorable John P. Nields, the sole presiding Judge thereof, for instructions, directions and orders with respect to such matter. After appropriate hearing with respect to said matter, the Honorable John P. Nields, as the sole presiding Judge of the District Court of the United States for the District of Delaware, being fully and sufficiently advised with respect to said matter, and being particularly fitted to pass upon the problems then confronting the Receivers by reason of his long conduct of said receivership and his intimate knowledge of the affairs and business of The Celotex Company being conducted in his Court, and being fully and sufficiently advised of all of the problems relating to said patent litigation by reason of the fact that he had heard said patent case
161 and had entered the decree which had been reversed by the Circuit Court of Appeals, after mature judgment and deliberation entered his order directing the Receivers to dismiss said petition for certiorari and to enter into said proposed agreements with Masonite Corporation, which are complained of in

this cause. Defendant further avers that said order of the District Court of the United States for the District of Delaware directing the Receivers appointed by said Court who were acting under the direction and subject to the control of said Court to enter into said agreements was an order entered by a court of competent jurisdiction fully and sufficiently advised in the premises, presided over by a judge of highest attainments, learned in the law and fully informed with respect to the entire character, scope, force and effect of the agreements directed to be entered into and that the Receivers acting as the arm of said Court were citizens of fine character, high repute, and possessed of a thorough understanding of the nature and character of the problems which confronted them in fully carrying out and discharging their duties as such Receivers, and that in following the directions of said Court in carrying on the negotiations leading up to the drafting of said agreements and in carrying out the directions of the Court in executing said agreements, they were prompted by proper and honest motives and were free from bias, influence or any improper considerations of any kind or character.

By said Agency Agreement the defendant Masonite Corporation authorized The Celotex Company and its Receivers to act as its non-exclusive del credere factor to sell and distribute to the building industry throughout the United States hardboard manufactured by said Masonite Corporation under its patents,

Masonite Corporation retaining to itself the right to sell
162 its hardboard to the nonbuilding industries. By said Supplemental Agreement Masonite Corporation agreed to waive an accounting and damages against The Celotex Company and its Receivers and to release them from the effect of an injunction, and said Receivers agreed to dismiss their application to the Supreme Court of the United States for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Third Circuit. These are the contracts by which the plaintiff alleges that the unlawful conspiracy to monopolize and restrain trade in hardboard was initiated. This defendant avers that, instead of constituting any unlawful agreement or conspiracy, the making of said contracts was wholly lawful.

42. Defendant admits that the Receivers for The Celotex Company at the time of the execution of said agreements were producing and had for some time been producing structural insulation board in large quantities, but denies that the Receivers in entering into said agreements were in any manner motivated by the considerations set forth in paragraph 42 of said complaint.

43. Defendant denies each and every averment contained in paragraph 43 of the complaint, except that defendant admits that certain agreements dated as therein averred were made between

Masonite and the Receivers for The Celotex Company, and avers that these agreements were not made as the result of any unlawful plan, unlawful monopoly, conspiracy, intent to restrain trade, or unlawful negotiation or other act whatsoever.

44. Defendant avers that paragraph 44 of the complaint does not state accurately the matters purported to be therein set forth, and denies all of the averments contained in said paragraph and for greater certainty refers to the agreement therein mentioned.

45. Defendant admits that the Receivers for The Celo-
163 tex Company entered into a supplemental agreement with Masonite Corporation and that the averments in respect to the contents of such supplemental agreement so far as they are set out in paragraph 45 of the complaint are correctly stated, but avers that said paragraph does not state all of the pertinent provisions of said supplemental agreement, and for greater certainty refers to the agreement itself.

46. Defendant avers that paragraph 46 of said complaint does not state accurately the matters therein purported to be set forth and denies all of the averments contained in said paragraph.

47. Defendant denies that the true purpose and effect of the agreements and alleged understanding set forth in paragraphs 43 and 46 of the complaint are correctly set forth in paragraph 47 thereof and denies all of the averments contained in said paragraph 47.

48. Defendant denies each and every averment contained in paragraph 48 of the complaint, except that defendant admits that the agreements were captioned "Agency Agreement and License Option" and "Supplemental Agreement" respectively.

49. Defendant denies each and every averment contained in paragraph 49 of the complaint.

50. Defendant is without knowledge or information sufficient to form a belief as to the making of the agreement mentioned in paragraph 50 of the complaint, but denies that such agreement, if made, was entered into in pursuance of any unlawful conspiracy.

51. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 51 of the complaint.

52. Defendant is without knowledge or information
164 sufficient to form a belief as to the truth of the averments contained in paragraph 52 of the complaint.

53. Defendant is without knowledge or information sufficient to form a belief as to the making of the agreements mentioned in paragraph 53 of the complaint, but denies that such agreements, if made, were entered into in pursuance of any unlawful conspiracy.

54. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 54 of the complaint.

55. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 55 of the complaint.

56. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 56 of the complaint.

57. Defendant is without knowledge or information sufficient to form a belief as to the making of the agreements mentioned in paragraph 57 of the complaint, but denies that such agreements, if made, were entered into in pursuance of any unlawful conspiracy.

58. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 58 of the complaint.

59. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 59 of the complaint.

60. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 60 of the complaint.

61. Defendant is without knowledge or information sufficient to form a belief as to the making of the agreement mentioned in paragraph 51 of the complaint, but denies that such agreement, if made, was entered into in pursuance of any unlawful conspiracy.

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62. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 62 of the complaint.

63. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 63 of the complaint.

64. Defendant is without knowledge or information sufficient to form a belief as to the making of the agreements mentioned in paragraph 64 of the complaint, but denies that such agreements, if made, were entered into in pursuance of any unlawful conspiracy.

65. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 65 of the complaint.

66. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 66 of the complaint.

67. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 67 of the complaint.

68. Defendant is without knowledge or information sufficient to

form a belief as to the truth of the averments contained in paragraph 68 of the complaint.

69. Defendant is without knowledge or information sufficient to form a belief as to the making of the agreements mentioned in paragraph 69 of the complaint, but denies that such agreements, if made, were entered into in pursuance of any unlawful conspiracy.

70. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 70 of the complaint.

166 71. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 71 of the complaint.

72. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 72 of the complaint.

73. Defendant is without knowledge or information sufficient to form a belief as to the making of the agreements mentioned in paragraph 73 of the complaint, but denies that such agreements, if made, were entered into in pursuance of any unlawful conspiracy. Defendant admits the averment contained in the last sentence of said paragraph.

74. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 74 of the complaint.

75. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 75 of the complaint.

76. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 76 of the complaint.

77. Defendant denies each and every averment contained in paragraph 77 of the complaint insofar as said averments relate to The Celotex Company, the Receivers of The Celotex Company, or this defendant. Defendant is without knowledge or information sufficient to form a belief as to the truth of the other averments contained in paragraph 77 of the complaint.

78. Defendant denies each and every averment contained in paragraph 78 of the complaint.

167 79. Defendant denies each and every averment contained in paragraph 79 of the complaint insofar as said averments relate to The Celotex Company, the Receivers of The Celotex Company or this defendant and denies each and every averment contained in said paragraph 79 with respect to any alleged conspiracy, monopoly, combination in restraint of trade, or other unlawful act whatsoever. Defendant is without

knowledge or information sufficient to form a belief as to the truth of the other averments contained in paragraph 79 of the complaint.

80. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 80 of the complaint.

81. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 81 of the complaint.

82. Defendant denies each and every averment contained in paragraph 82 of the complaint except insofar as the same are hereinafter in this paragraph 82 of this answer admitted. Defendant avers that on February 8, 1935, long after the Receivers of The Celotex Company had entered into the agreements with Masonite Corporation as averred in paragraph 41 of this answer, a petition for reorganization of The Celotex Company under the provisions of Section 77B of the Bankruptcy Act was filed in the District Court of the United States for the District of Delaware, and an order entered by the Honorable John P. Nields, the sole presiding Judge of said Court, granting the prayer of said petition and appointing Trustees for The Celotex Company, and that thereafter and prior to October 29, 1936, said Court and the Judge therein entered a certain decree of confirmation of the Plan of Reorganization of The Celotex Company under the terms of which Plan of Reorganization this defendant, The Celotex Corporation,
168 became and was constituted the corporation to act as the reorganized company mentioned in said Plan of Reorganization so confirmed. In and by the decree of confirmation entered by said Court and the Judge thereof after mature consideration and extended and protracted hearings, this defendant, The Celotex Corporation, was ordered and directed to take over and to assume and to carry out the terms and provisions of said agreements so entered into between the Receivers of The Celotex Company and Masonite Corporation as aforesaid set forth in paragraph 41 of this answer. The Supplemental Agreement between Masonite Corporation and the Receivers of The Celotex Company contained provisions obligating Masonite Corporation to extend to the various factors the benefit of any modification in the respective agency agreements which might thereafter be extended to any factor and which were more favorable to such factor than the corresponding provisions in the agreements in force and effect with the other factors: known colloquially as "most favored nation clauses." From time to time modifications were in fact made in divers particulars in certain of the agency agreements and also disputes arose, one at least of which was settled by arbitration, and others by interpretations of counsel. As a re-

sult, as time went on, the agency agreements ceased by themselves to embody the full contract between Masonite Corporation and the individual factors. Therefore in 1936 it was deemed advisable to rewrite each of said agreements for the purpose of codifying them, clarifying them, and making them uniform and consistent, and on October 29, 1936, such new agreements, together with certain supplemental agreements of even date, were entered into between this defendant and Masonite Corporation, and such new agreements were substituted for and superseded the agreements entered into between the Receivers of The Celotex Company and Masonite Corporation on October 10, 1933. This defendant en-
169 tered into said new agreements pursuant to the provisions of said earlier agreements. The new agreements contained no provisions inconsistent with or contrary to the general scope and effect of said earlier agreements and the execution of said new agreements was but in furtherance of the effectuating of the terms and provisions of said original agreements entered into by the Receivers of The Celotex Company at the direction of the District Court of the United States for the District of Delaware as set forth in paragraph 41 of this answer, and in furtherance of the directions given to this defendant in and by said decree of confirmation and the decrees and orders of said court designed to carry said Plan of Reorganization into effect. Defendant further avers that it is advised and upon information and belief avers that new agreements of similar tenor and effect to those entered into by this defendant on October 29, 1936, were entered into between Masonite and the other defendants (other than this defendant) mentioned in paragraph 82 of the complaint and that such new agreements superseded the prior agreements between Masonite Corporation and said other defendants.

83. Defendant denies that paragraph 83 of the complaint correctly states the true contents, meaning, and legal effect of the agreements of October 29, 1936, therein referred to and denies all the averments contained in said paragraph. For greater certainty with reference to the meaning, terms, and effect of said agreements defendant refers to the agreements themselves.

84. Defendant denies each and every averment contained in paragraph 84 of the complaint insofar as said averments relate to The Celotex Company, the Receivers of The Celotex Company or this defendant. Defendant is without knowledge or information sufficient to form a belief as to the truth of the other averments contained in paragraph 84 of the complaint.

85. Defendant denies each and every averment con-
170 tained in paragraph 85 of the complaint, except that upon information and belief it admits that on or about January 30, 1937, Hawaiian Cane assigned to defendant Certain-teed all of Hawaiian Cane's rights in the agreement therein referred to, that defendant Certain-teed accepted the assignment and agreed to observe all the terms and provisions of the agreement, and that defendant Masonite consented to the assignment of the agreement by Hawaiian Cane to Certain-teed.

86. Defendant denies each and every averment contained in paragraph 86 of the complaint.

87. Defendant denies each and every averment contained in paragraph 87 of the complaint, except that it admits that prior to March 1937, Flintkote had been distributing Masonite's hardboard as selling agent of Insulite.

88. Defendant denies that the true contents, meaning and legal effect of the agreements referred to in paragraph 88 of the complaint are as therein stated and denies all the averments contained in said paragraph. For greater certainty with reference to the meaning, terms and effect of said agreements the defendant refers to the agreements themselves.

89. Defendant denies each and every averment contained in paragraph 89 of the complaint.

90. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 90 of the complaint in so far as they relate to defendants other than this defendant, and in so far as said averments relate to The Celotex Company, the Receivers of The Celotex Company and this defendant, this defendant denies each and every averment contained in paragraph 90 of the complaint and further denies
that any acts such as those alleged in paragraph 90 of the
171 complaint, if done, were done pursuant to or as a part of any combination or conspiracy or agreement in restraint of trade or commerce. This defendant admits that it has in good faith and with lawful purpose and free from the furtherance of any combination or conspiracy or agreement in restraint of trade or commerce endeavored to abide by and perform all of the covenants and agreements on its part assumed or undertaken under the terms of the agreements entered into between the Receivers of The Celotex Company and Masonite Corporation so assumed by this defendant as aforesaid and the agreements entered into by this defendant and Masonite Corporation which superseded such former agreements.

91. Defendant denies each and every averment contained in paragraph 91 of the complaint, except that defendant admits that from the time of the making of the respective del credere factor contracts by defendant Masonite Corporation with the respective co-defendants herein defendant Masonite Corporation has (a) manufactured hardboard and supplied the same on consignment to its respective del credere factors for distribution and sale by them; (b) pursuant to said del credere factor contracts fixed prices, terms and conditions of sale at which said agents and defendant Masonite Corporation have made their respective sales of hardboard; (c) pursuant to said del credere factor contracts designated the classifications of customers to whom the said agents might make sales of hardboard and reserved to itself generally the exclusive sale of hardboard to the non-building industries; and (d) allowed to the said agents commissions upon the sale by them of this defendant's hardboard ranging from 35% to 52% of its carlot list price to dealers, which said commissions varied with the different types of hardboard and also with the amount of total annual sales by the agents.

92. Defendant is without knowledge or information
172 sufficient to form a belief as to the truth of the averments contained in paragraph 92 of the complaint.

93. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 93 of the complaint.

94. Defendant denies each and every averment contained in paragraph 94 of the complaint.

95. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 95 of the complaint.

96. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 96 of the complaint.

97. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 97 of the complaint.

98. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 98 of the complaint.

99. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 99 of the complaint.

100. Defendant denies each and every averment contained in paragraph 100 of the complaint.

101. Defendant denies each and every averment contained in paragraph 101 of the complaint.

102. Defendant denies each and every averment contained in paragraph 102 of the complaint.

103. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 103 of the complaint.

104. Defendant admits the averments contained in the
173 first sentence of paragraph 104 of the complaint, but is *without knowledge* or information sufficient to form a belief as to the truth of the other averments contained in said paragraph.

105. Defendant denies each and every averment contained in paragraph 105 of the complaint.

106. Defendant denies that the conclusions and characterizations contained in paragraph 106 of the complaint as to important features of the del credere factor agreements are correctly stated and denies all of the averments of said paragraph. For greater certainty and accuracy the defendant refers to the actual terms of said agreements.

107. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 107 of the complaint.

108. Defendant denies each and every averment contained in paragraph 108 of the complaint.

109. Defendant denies each and every averment contained in paragraph 109 of the complaint and specifically denies having established, maintained, or been a party to any conspiracy, monopoly, or combination in restraint of trade by means of acts therein alleged, or any other acts, and specifically denies that it has committed the alleged illegal acts therein referred to, or any of them.

Defendant denies each and every averment in the complaint not herein before admitted, controverted, or explained, or specifically denied.

In concluding this answer, and while praying that this suit be dismissed, the defendant asserts that it has done equity, has always desired and has been willing, and now desires and is willing, to do equity and to confer and cooperate with the Gov-

174 ernment in all reasonable and proper ways and in the furtherance of appropriate commercial and social objectives.

Wherefore, defendant prays that this suit be dismissed.

CRAVATH DE GERSDORF, SWAINE & WOOD,
By THOMAS A. HALLERAN,
A Member of said Firm.
15 Broad Street, New York, N. Y.,
Attorneys for The Celotex Corporation.

CARL W. PAINTER,
BRUCE BROMLEY,
THOMAS A. HALLERAN,
15 Broad Street, New York, N. Y.
HARRY B. HURD,
ANDREW J. DALLSTREAM,
LINCOLN R. CLARK,
231 South LaSalle Street, Chicago, Illinois,
Of Counsel.

175 [*Duly sworn to by B. G. Dahlberg; jurat omitted in printing.*]

Copy received 5/13/40.

SAMUEL S. ISSEKS,
Special Assistant to the Attorney General.

176 In District Court of the United States for the Southern District of New York

[Title omitted.]

Supplemental answer of the Celotex Corporation

As a supplemental answer to the complaint herein and by way of additional separate and complete defense, and partial defense, to the cause of action set forth in the complaint herein, the Celotex Corporation alleges:

PART THIRD. 1. After joinder of issue herein and as of March 20, 1941, the defendant, The Celotex Corporation, made and entered into an agreement with the defendant, Masonite Corporation, which agreement was in the form of the agreement annexed to, marked Exhibit "A" and made a part of the supplemental answer of Masonite Corporation filed in this cause, to which said Exhibit "A" reference is hereby made and the same is hereby incorporated herein by reference and made a part hereof as fully and as completely as though herein set forth at length. Said agreement, dated as of March 20, 1941, so entered into between Masonite Corporation and this defendant, The Celotex

177 Corporation, is now in full force and effect and the respective parties thereto are now acting thereunder. Said agreement, herein referred to as the "new agreement," cancelled and terminated as of March 20, 1941, the then existing del credere agreement between Masonite and this defendant and any and all supplement or supplements thereto. Said agreement completely supersedes and replaces as of March 20, 1941, any and all preexisting agreements between the respective parties relating to the manufacture, distribution, and sale of the various hardboard products of Masonite known as "hardboard," as defined in paragraph C of Part I of the answer of the defendant Masonite filed in this cause. As of the same date, that is to say March 20, 1941, this defendant, The Celotex Corporation, made a supplemental agreement with Masonite continuing in force for the life of said "new agreement" the previously existing supplemental agreement relating to the estoppel by judgment in respect of the final decree entered against the Receivers of The Celotex Company by Masonite in the patent suit in the District Court of the United States for the District of Delaware, referred to in the answer of this defendant heretofore filed in this cause.

2. In entering into such new agreement and in making and filing this supplemental answer this defendant did not have and does not now have any idea or intention of withdrawing, altering, or qualifying in any manner or respect whatsoever any of the denials or allegations made by it in its original answer herein or of admitting expressly or by implication any of the charges or allegations in the complaint, or the illegality or impropriety to any extent or degree whatsoever of any action by it or by any of the other
178 defendants, or of any prior agreement or arrangment between it and Masonite, or between any of the other defendants and Masonite, or between it and any of the other defendants other than Masonite. On the contrary this defendant expressly affirms and realleges all of the denials and allegations contained in its prior answer.

3. On March 20, 1941, this defendant through its counsel joined in presenting to and filing with an assistant to the Attorney General of the United States of America several copies of the aforementioned said form of new agreement and thereby informed the Attorney General that it was about to enter into such new agreement with Masonite. At the same time Masonite informed the Attorney General that Masonite intended to enter into like agreements with the other defendants in this cause. At the same time this defendant through counsel stated that it would be glad to be informed of any view or opinion by the Attorney General as to the legality or illegality, propriety or impropriety of such new agreement or of any clause of provision thereof, in

order that this defendant might have the opportunity of considering and urging upon Masonite the revision or alteration of the new agreement in such wise as to meet and remove, if reasonably possible, any criticism of the contents of such new agreement by the Attorney General, while at the same time enabling this defendant to continue to make available to its customers hardboard products of the character which it had distributed for many years as agents of Masonite. This defendant in common with the other defendants thereby sought, while fully maintaining the allegations of its answer, to afford to the Attorney General a basis for the
179 discontinuance of the present suit without need for trial or occasion for controversy.

4. After examination of the new agreement said assistant to the Attorney General informed the counsel for this defendant and the respective counsel for other defendants in this cause, that it would not be in accord with the policy of the Department of Justice to express in advance any view or opinion concerning such new agreement or concerning any portion thereof; that Masonite and the other defendants in this cause had a right to enter into any new agreement as to their respective businesses in accordance with law; and that after the new agreement was made and entered into between Masonite and any or all of the other defendants or with any other agents, the Department would then determine its opinion and course with respect thereto and with respect to its effect, if any, upon this present suit.

5. Thereupon it was agreed that a supplemental answer or answers embodying such new agreement could be served without further course and without further notice; and that the Attorney General could serve and file as a matter of course a supplemental pleading in rejoinder if he so desired.

6. This defendant and each of the other defendants have at all times been desirous of complying with the law and conducting its business in accordance with the Statutes of the United States as interpreted by its courts; and this defendant believes that it has done so at all times. This defendant however is aware and alleges that there are and have been divergent opinions as to the proper construction, interpretation and application of those Statutes and particularly of the Anti-Trust Statutes. This defendant has entered into such a new agreement in good
180 faith and in an honest and sincere belief that the same places the conduct of the distribution of the hardboard manufactured by Mansonite Corporation on such a basis that no plausible criticism may be leveled under the Anti-Trust Statutes, and at the same time there is preserved the ability of this defendant to continue to make available to its customers the hardboard products which it has for so many years supplied to them, and

enables this defendant to continue to supply the defense program not only with the other products which it manufactures or distributes, but also with hardboard products.

The Celotex Company, beginning back in 1920, pioneered the development of structural insulation and through years of labor, research and expense produced inventions covering structural insulation, built factories for its manufacture and promoted the use and public acceptance of structural insulation. It developed the local lumber dealers (of which there are more than 20,000 throughout the United States) as the principal source of distribution of such type of material, and through years of effort built up an acceptance by such dealers of wall board as a regular item of their sales inventory. In promoting and developing the field of structural insulation it discovered a means of utilizing bagasse, the by-product resulting from the processing of sugar cane into cane sugar, as the basic material for manufacture of structural insulation, thereby converting what had theretofore been a waste product into a product of use in producing structural insulation affording insulation against noise, heat and cold.

Prior to 1920 insulation of homes and dwellings was practically unknown. During the next ten years, largely through the
181 efforts of The Celotex Company, insulation became virtually a requirement in the construction of livable homes and dwellings. Having developed structural insulation and secured its public acceptance and widespread use, The Celotex Company established the dealer distribution for such products, and many of the companies engaged in the manufacture and distribution of other building materials and supplies were attracted to this field. Plant after plant was constructed by various manufacturers of building material for the manufacture of structural insulation, until finally the business developed and built up by The Celotex Company and this defendant as its successor upon reorganization, became one of the most highly competitive industries in the building material field, so that today there are more than fifteen large plants in the United States engaged in the manufacture of structural insulation, and most of the large distributors of building supplies are engaged in the distribution of structural insulation.

Shortly prior to 1929, The Celotex Company developed a process whereby it could produce through the processing of bagasse, a hard panel board substantially identical in use and function (as well as in general appearance) with the hardboard products manufactured by Masonite. Masonite having sought to enjoin this defendant from manufacturing such hard panel board products, on the ground that the manufacture and processing of such products infringed the patent of Masonite, and Masonite having insti-

luted suit for that purpose, said suit was vigorously defended by The Celotex Company until the time of its receivership, and thereafter by the independent Receivers acting under the direction of the District Court of the United States for the District of Delaware. The Receivers of The Celotex Company having won
182 such patent case in the District Court for the District of Delaware on the ground of non-infringement, an appeal was prosecuted by Masonite and despite the vigorous opposition to said appeal by the Receivers of The Celotex Company, Masonite prevailed upon said appeal, and the mandate of the Circuit Court of Appeals was to the effect that such Receivers and The Celotex Company should be enjoined from manufacturing or selling such hard panel board products.

Up to that time The Celotex Company and its Receivers had promoted the widespread use of such hard panel board products as were manufactured by it, or them, and their customers throughout the United States had become accustomed to purchasing from The Celotex Company and its Receivers in the same carlot shipments not only structural insulation, but also these hard panel board products. Upon the decision of the Circuit Court of Appeals the Receivers of The Celotex Company were faced not only with the complete loss of their hard panel board business, but with the loss of a large number of their customers unwilling to continue as customers unless they were enabled to purchase both structural insulation and hard panel board in the same carlot shipments. To meet this situation the Receivers of The Celotex Company with the authority and approval, and acting under the direction, of the District Court of the United States for the District of Delaware, entered into the del credere agency agreement with Masonite as the only type of arrangement which they could negotiate with Masonite Corporation for the distribution of hardboard products manufactured by it. Upon information and belief, the Receivers had no other recourse inasmuch as by the decision of the Circuit Court of Appeals Masonite's monopoly under its patent was
188 adjudicated with respect to the manufacture, sale and distribution of such hardboard products, and The Celotex Company and its Receivers were enjoined from engaging in such business. Despite the years of research carried on by The Celotex Company and its Receivers, they had been unable to develop any product not infringing the Masonite patents which would enable them to produce an article of commerce effectively competitive with Masonite hardboard and the said Receivers were advised that in the light of the decision of the Circuit Court of Appeals their Research Department was then unable to visualize how a product competitive with Masonite hardboard product could be produced

by them without infringing Masonite's patent so held to be valid and infringed.

Upon the organization of The Celotex Corporation it was directed by the District Court of the United States for the District of Delaware to accept by assignment the agreement between the Receivers of The Celotex Company and Masonite and to assume and carry out the obligations of such agreement. The agreement of October 29, 1936, was an agreement entered into between The Celotex Corporation and Masonite substantially identical with the earlier agreement except that it embodied such changes as in the light of experience seemed desirable to effectuate the purpose and intent of the dealer agreement.

The Celotex Corporation during the early years during which these agreements with Masonite were in effect was in a large measure responsible for securing the widespread use of hardboard and establishing the local lumberyard and material supply dealer as the outlet for distribution of such products to the ultimate consumer. Although this defendant was then largely instru-
184 mental in establishing this dealer distribution for the products of Masonite, the other del credere agents and Masonite itself have been able through the years to increase the volume of sales initiated by them through the local lumber and material supply dealer outlets, with a gradual loss year after year to this defendant, The Celotex Corporation, of its percentage participation of Masonite hardboard products so distributed.

7. By reason of the foregoing, among other facts, there now exists and has existed for many years every incentive to this defendant to distribute, were it able so to do, hardboard products of its own manufacture, and this defendant has constantly though as yet unsuccessfully carried on research in and effort to produce hardboard products capable of being manufactured by it at a cost which would make the same competitive with the hardboard products manufactured by Masonite and at the same time be products so manufactured and of such a character as would not constitute an infringement of the patents owned by Masonite.

For some time the plants of this defendant, The Celotex Corporation, have been operating on a twenty-four hour-a-day basis and in excess of their rated capacity in an effort to supply materials required in the national-defense program, and this defendant has had to curtail supplying the requirements of certain of its regular customers. This defendant does not now have facilities capable of manufacturing hardboard products were it free from the limitations of the injunction which prevents it from engaging in such manufacture. The construction of plants and facilities to manufacture hardboard products, could the defendant legally

engage in such manufacture, would require the expenditure of sums largely in excess of a million dollars, and in view of the present shortage of materials and manufacturing facilities
185 to supply the machinery required, would entail a delay of some two to three years before the construction of such plant could be completed. In view of the years of successful manufacture of hardboard by Masonite and the efficiency which it has developed in producing hardboard in quantities at low cost of production, it would be many years before this defendant could, were it legally permitted so to do, manufacture hardboard products at a cost competitive with the hardboard manufactured by Masonite and distributed by this defendant as its agent. In the efforts of this defendant to negotiate the arrangements with Masonite as embodied in the original agreement and as now embodied in the new agreement, all the foregoing facts and circumstances were taken into account. The existing arrangement represents the only arrangement which this defendant has been able to work out with Masonite. It represents the results of a sincere and honest effort to insure that this defendant may continue to supply its customers throughout the United States with the hardboard products which they have been accustomed to buy through the agency of this defendant, and at the same time to preserve and protect the established business of this defendant in selling structural insulation by being able to compete with the other suppliers of structural insulation, each of which is furnishing hardboard in the same carlot shipments.

8. This defendant is advised by counsel that Masonite as the holder of United States Letters Patent, duly adjudicated as valid as aforesaid, covering the process of manufacturing hardboard, and the product itself, has the right to manufacture, use, and sell hardboard, and the right to prevent others from exercising like privileges without its consent. Therefore, if the existing
186 agreements are not continued in effect Masonite may refuse to permit others to sell or distribute hardboard under terms and conditions other than those set forth in the existing agreements, and elect to supply all of the local distributing outlets directly from its own factory, thus entirely excluding this defendant and all of the other present agents of Masonite from the hardboard business. The loss of this sole source of hardboard available to this defendant and the other agents of Masonite, defendants in this cause, could result not only in Masonite distributing directly all of the hardboard distributed throughout the United States, but also the acquisition by Masonite of much of the structural insulation business secured by this defendant and others who have been responsible for the development and promotion of such business.

No ulterior or hidden purpose has been sought to be accomplish by the new agreement, and no conspiracy or combination to restrain interstate trade or to fix prices or to monopolize is embodied in or exists in connection with the new agreement. The making thereof and the terms and provisions thereof have been carefully considered by counsel for this defendant who have advised it that the making of this new agreement and the terms and provisions thereof are in their opinion wholly lawful and free from encroachment upon any statutory restrictions or prohibitions.

9. Accordingly, this defendant is serving this supplemental answer in order that the new agreement and the making thereof may be brought within the scope and purview of the present action for judgment and determination by the Court as
187 to the complete lawfulness thereof and for such effect in connection with the disposition and dismissal of the present suit as may be lawful.

10. It is also the purpose and intent of this defendant to observe fully and completely in letter and in spirit and in utmost good faith, the terms, conditions, and provisions of the new agreement. This defendant hereby disclaims and denies any intention at any future time to reinstate any preexisting agreement cancelled and terminated by this new agreement.

11. This defendant urges upon the Court that by reason of the entry in good faith into the new agreement it would serve no useful purpose for the Court to proceed with the trial of this cause.

Wherefore, The Celotex Corporation prays that the relief demanded in the complaint be denied and that the suit be dismissed as against this defendant and the other defendants in this cause.

CRAVATH, DE GERSDORFF, SWAINE & WOOD,
By THOMAS A. HALLERAN,
A member of said firm,
15 Broad Street, New York, N. Y.,
Attorneys for the defendant, The Celotex Corporation.
ANDREW J. DALLSTREAM,
231 South La Salle Street, Chicago, Illinois.
CARL W. PAINTER,
THOMAS A. HALLERAN,
15 Broad Street, New York, N. Y.
Of Counsel.

188 In United States District Court, Southern District of New York

[Title omitted.]

Answer of Defendant, Armstrong Cork Company

The defendant, Armstrong Cork Company, by its attorneys, LeBoeuf, Machold & Lamb, answering the complaint herein:

I. Denies that it has any knowledge or information sufficient to form a belief as to the truth of the averments contained in the paragraphs designated 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 12.

II. Admits the averments of the paragraph designated 11.

III. Denies that it has any knowledge or information sufficient to form a belief as to the truth of the averments contained in the paragraphs designated 13 and 14, except it admits that at the time of the commencement of this action and for some time prior thereto it was and now is engaged in the sale of a product manufactured by the defendant Masonite Corporation (herein, for convenience, sometimes called "defendant Masonite") sometimes known as "hardboard," which, upon information and

189 belief, is manufactured by said defendant Masonite Corporation under a process covered by United States letters patent issued to one William H. Mason and now owned by the defendant Masonite and that, upon information and belief, said product is manufactured from wood and woody materials and is used in the building industry for the purposes, among others, set forth in said paragraph 13 and also for industrial uses, including, among others, those set forth in said paragraph 13.

IV. Denies that it has any knowledge or information sufficient to form a belief as to the truth of the averments contained in the paragraphs designated 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, and 35.

V. Denies the averments contained in the paragraph designated 27, except it admits that in the years 1931 and 1932 this defendant made inquiries of the defendant Masonite in regard to the issuance to this defendant by said defendant Masonite of a license for the manufacture of a commodity sometimes known as "hardboard" or "presdboard" which, upon information and belief, is and was then covered by United States letters patent owned by defendant Masonite and that after a consideration of the matter by this defendant and defendant Masonite no agreement was entered into regarding such license, due to the fact that the parties were unable to reach an agreement regarding the value of a license under said patents or the amount of royalty or other charge to be paid for such license and due, further, to the

fact that there was then pending before the courts for determination the issue as to the validity of the said patents.

VI. Denies each and every averment contained in the paragraph designated 36.

190 VII. Denies that it has knowledge or information sufficient to form a belief as to the truth of the averments contained in the paragraph designated 37.

VIII. Denies each and every averment contained in the paragraph designated 38; and denies specifically the averment that this defendant, subsequent to October 10, 1933, or at any other time, conspired or combined unlawfully, or joined with other defendants, to restrain trade and commerce in hardboard; and denies specifically that it joined with the defendants Masonite and the defendant Celotex, or with any other defendants named herein, to monopolize or attempt to monopolize, or to maintain any unlawful monopoly, or unlawfully to restrain or to attempt to restrain trade and commerce, in hardboard, as averred in paragraph 37 and said paragraph 38 of the complaint herein.

IX. Denies each and every averment contained in the paragraphs designated 39 and 40.

X. Denies that it has knowledge or information sufficient to form a belief as to the truth of the averments contained in the paragraphs designated 41, 42, 43, 44, 45, 46, 47, and 48.

XI. Denies each and every averment contained in the paragraph of the complaint designated 49.

XII. Denies that it has knowledge or information sufficient to form a belief as to the truth of the averments contained in the paragraphs designated 50, 51, 52, 53, 54, 55, 56, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, and 76.

XIII. Denies each and every averment in the paragraphs
191 designated 57, 58, 59, and 60, except this defendant admits that on or about December 1, 1933, this defendant entered into 2 agreements in writing with the defendant Masonite described, respectively, as "Agency Agreement and License Option" and "Supplemental Agreement" and that long prior to the commencement of this action the said agreements were cancelled and that at the time of the commencement of this action and at the present time said agreements were and are no longer in effect; and for greater certainty this defendant hereby incorporates by reference and begs to refer to the provisions of said agreements for a true and correct statement of their contents and legal effect, as if said agreements were herein set forth at length.

XIV. Denies each and every averment contained in the paragraph designated 77 insofar as said averments refer or purport to refer to agreements entered into by this defendant and defendant Masonite; and insofar as said averments refer or purport to refer to agreements entered into by defendants other than this

defendant with defendant Masonite, this defendant denies that it has any knowledge or information sufficient to form a belief as to the truth of the said averments.

XV. Denies each and every averment contained in the paragraphs designated 78 and 79 insofar as they refer or purport to refer to agreements entered into by this defendant and the defendant Masonite; but this defendant admits that said agreements established a legal relationship of principal and agent between this defendant and defendant Masonite and were and are properly designated as "agency agreements"; and insofar as said averments refer or purport to refer to agreements entered into by defendants other than this defendant with the defendant Masonite,
192 this defendant is without knowledge or information sufficient to form a belief as to the truth of said averments.

XVI. Denies each and every averment contained in the paragraph designated 80, except it admits that on or about November 29, 1935, the defendant Masonite Corporation gave to this defendant a written notice regarding the cancellation of the agreements in writing entered into by this defendant and the defendant Masonite on or about December 1, 1933; admits that after said date three carloads of hardboard products were shipped by defendant Masonite pursuant to orders placed by this defendant with defendant Masonite upon the terms and provisions of an agency agreement then in effect between this defendant, as agent or factor, with the defendant Masonite Corporation, as principal; and for greater certainty as to the contents and legal effect thereof it hereby refers to and incorporates the same by reference as if herein set forth at length.

XVII. Denies that it has any knowledge or information sufficient to form a belief as to the truth of the averments contained in the paragraph designated 81.

XVIII. Denies each and every averment contained in the paragraph designated 82, insofar as they refer or purport to refer to an agreement or agreements entered into by this defendant with defendant Masonite Corporation, except that it admits that an agreement in writing, dated October 29, 1936, establishing the legal relationship of principal and agent, or principal and factor, between this defendant and defendant Masonite Corporation and entitled "Del Credere Factors Agreement" was entered into between this defendant and the defendant Masonite Cor-
193 poration, applicable to sales and shipments of hardboard manufactured and sold by defendant Masonite Corporation pursuant to orders taken by this defendant, as agent, or factor, for said defendant Masonite Corporation, as principal; and for the true contents and legal effect thereof this defendant hereby refers to and hereby incorporates said agreement herein by reference as if herein set forth at length; but this defendant is with-

out knowledge or information sufficient to form a belief as to the truth of said averments insofar as they refer or purport to refer to agreements alleged to have been entered into by defendants other than this defendant with the defendant Masonite.

XIX. Denies each and every averment contained in the paragraphs designated 83 and 84, except that, as hereinbefore admitted, this defendant admits that it entered into an agreement in writing with the defendant Masonite Corporation, dated October 29, 1936, and for the true contents and legal effect thereof this defendant hereby refers to and hereby incorporates said agreement herein by reference as if herein set forth at length.

XX. Denies that it has any knowledge or information sufficient to form a belief as to the truth of the averments of the paragraph designated 85.

XXI. Denies each and every averment contained in the paragraph designated 86 insofar as they refer or purport to refer to any agreement alleged to have been entered into by this defendant with the defendant Masonite Corporation; and insofar as the averments of said paragraph refer to or purport to refer to agreements alleged to have been entered into by defendants other than this defendant with the defendant Masonite this defendant is without knowledge or information sufficient to form a belief as to the truth of said averments.

194 XXII. Denies that it has knowledge or information sufficient to form a belief as to the truth of the averments contained in the paragraphs designated 87, 88, and 89.

XXIII. Denies each and every averment contained in the paragraph designated 90 insofar as they refer or purport to refer to this defendant, except that this defendant admits that this defendant, as agent or del credere factor for the defendant Masonite Corporation, as principal, and acting under and pursuant to the terms of a del credere factors agreement then in effect between this defendant and defendant Masonite Corporation, from time to time has sold a commodity sometimes known as "hardboard" manufactured by said defendant Masonite Corporation, but this defendant denies that any of its sales of said "hardboard" are, or have been, pursuant to any combination or conspiracy or agreement to monopolize or restrain trade and commerce; and insofar as said averments refer or purport to refer to other defendants, this defendant is without knowledge or information sufficient to form a belief as to the truth of the said averments.

XXIV. Denies each and every averment contained in the paragraph designated 91, insofar as they refer or purport to refer to this defendant, except that this defendant admits that a commodity sometimes known as "hardboard," sold by this defendant, as agent or del credere factor for defendant Masonite Corporation,

as principal, under the terms, provisions, and conditions of del credere factors agreements, entered into with the defendant Masonite Corporation, was manufactured by defendant Masonite Corporation and that the functions performed by this defendant, as del credere agent or factor, for defendant Masonite in the sale of such commodity have been governed by the provisions of
195 said agreements, or as from time to time prescribed thereunder by defendant Masonite, as the manufacturer or the principal named in said agreement, and under which this defendant was and is designated as a del credere agent or factor; and insofar as said averments refer or purport to refer to defendants other than this defendant, this defendant is without knowledge or information sufficient to form a belief as to the truth of said averments.

XXV. Denies that it has knowledge or information sufficient to form a belief as to the truth of the averments contained in the paragraphs designated 92 and 93.

XXVI. Denies each and every averment contained in the paragraph designated 94.

XXVII. Denies that it has knowledge or information sufficient to form a belief as to the truth of the averments contained in the paragraphs designated 95, 96, 97, 98, and 99.

XXVIII. Denies each and every averment contained in the paragraphs designated 100, 101, 102, and 103 insofar as they, or any of them, refer or purport to refer to this defendant and denies that it has any knowledge or information sufficient to form a belief as to the truth of said averments insofar as they, or any of them, refer or purport to refer to other defendants.

XXIX. Denies that it has any knowledge or information sufficient to form a belief as to the truth of the averments contained in the paragraph designated 104.

XXX. Denies each and every averment contained in the paragraph designated 105.

XXXI. Denies each and every averment of the paragraph designated 106; and insofar as said averments refer
196 or purport to refer to the said agreement, dated October 29, 1936, entered into by this defendant with defendant Masonite and designated "Del Credere Factors Agreement," this defendant specifically denies that the averments of the "important features" of the said agreement are true and correct and this defendant begs leave to refer to said agreement, as aforesaid, for a true and correct statement of the terms, provisions, and conditions thereof.

XXXII. Denies each and every averment contained in the paragraph designated 107, except defendant admits that during the year 1938 its representatives discussed with representatives of the defendant Masonite Corporation the matter of the granting

to this defendant a license under patents covering the manufacture of a commodity known as "hardboard" which said patents, upon information and bellef, were owned by defendant Masonite Corporation and admits that at the time of the commencement of this action no agreement for the granting of such a license had been entered into between this defendant and the defendant Masonite Corporation; further answering, this defendant denies that it has any knowledge or information sufficient to form a belief as to the truth of the averments relating to the alleged "reluctance" on the part of the defendant Masonite Corporaation to enter into an agreement with this defendant for the granting to this defendant of a license for the manufacture of a commodity known as "hardboard" under United States letters patent owned by said defendant Masonite Corporation.

XXXIII. Denies that it has any knowledge or information sufficient to form a belief as to the truth of the averments contained in the paragraph designated 108.

197 XXXIV. Denies each and every averment contained in the paragraph designated 109; and this defendant specifically denies that it has entered into or become a party to any agreement, combination or conspiracy to monopolize or attempt to monopolize or to restrain trade or commerce; and further specifically denies that it is a party to any unlawful monopoly or conspiracy or any combination in restraint of trade; and further specifically denies that it has committed any of the acts as averred in said paragraph.

XXXV. Finally and further answering, this defendant denies each and every averment in the complaint contained which this defendant has not herein admitted, controverted, explained, or specifically denied.

Wherefore, this defendant prays that the complaint herein be dismissred as against it.

LeBoeuf, Machold & Lamb,
Attorneys for Defendant Armstrong Cork Company,
15 Broad Street, New York, New York.
By (Signed) Horace R. Lamb,
A member of said firm.

Messrs. Smith, Buchanan & Ingersoll,
Frank B. Ingersoll, Esq.,
1025 Union Trust Building, Pittsburgh, Pennsylvania,
Walter F. Kaufman, Esq.,
Lancaster, Pennsylvania,
Of Counsel.

Copy received 4/29/40.

Samuel S. Isseks,
Special Assistant to the Attorney General.

198 In United States District Court, Southern District of New York

[Title omitted.]

Supplemental answer of Armstrong Cork Company

The defendant Armstrong Cork Company, by its attorneys, LeBoeuf, Machold & Lamb, for its supplemental answer and as a separate affirmative defense to the complaint herein alleges:

1. Since the date of its original answer herein, the defendant Masonite Corporation (herein for convenience sometimes called "defendant Masonite") and the defendant Armstrong Cork Company (herein for convenience sometimes called "defendant Armstrong") entered into an agreement in writing dated March 20, 1941 (herein for convenience called "the new agency agreement") which establishes the relationship of principal and agent or principal and factor between defendant Masonite and defendant Armstrong. Said new agency agreement is entitled "Appointment of Agent between Masonite Corporation as Principal and Armstrong Cork Company, Agent." Annexed hereto as an exhibit is a true and correct copy thereof. Said new agency agreement is applicable to all sales and shipments of hardboard sold by defendant

199 Masonite, as principal or seller, pursuant to orders taken by defendant Armstrong, as agent or factor for said defendant Masonite, from and after the effective date thereof. Said new agreement is now and as of March 20, 1941, has been, in full force and effect.

2. Prior to the execution of the said new agency agreement a proposed copy thereof was submitted to the Assistant Attorney General of the United States in charge of the antitrust division of the Department of Justice by counsel for the several defendants herein who stated that it was the intention of the said defendants to enter into separate agreements between defendant Masonite and each of the other defendants herein in the form and containing the provisions as submitted. Thereafter the members of the legal staff of the said Assistant Attorney General to whom copies of the proposed new agency agreement had been submitted, in effect, informed the counsel for the several defendants that the said Assistant Attorney General could not undertake to express any opinion regarding the legality of either the form or the contents of the proposed new agency agreement and that, so far as the government was concerned, the defendants were free to enter into any agreement or agreements as they might determine, but no objection was expressed on behalf of the government to the execution and delivery of the proposed new agency agreement by the defendants, including the defendants Armstrong and Masonite.

3. The said new agency agreement, by its express terms, provides that it shall supersede in all respects an agreement between defendant Masonite and defendant Armstrong dated October 29, 1936, and the supplement or supplements thereof (to which reference is made in the complaint herein) and that said agree-
200 ment dated October 29, 1936, and said supplements shall be terminated in all respects as at the effective date of the new agency agreement,

4. By reason of the execution and delivery of said new agency agreement and the termination of the said agreement dated October 29, 1936, and the supplements thereto, in the circumstances hereinabove alleged, the issues purportedly raised in the complaint herein have become and now are moot and academic and there is, therefore, no issue now before this Court nor is there a case or controversy within the meaning of Section 2 of Article III of the Constitution of the United States, raised by the complaint as to said defendant Armstrong.

Wherefore, this defendant prays that the complaint herein be dismissed as against it.

Respectfully submitted.

LEBOEUF, MACHOLD & LAMB,
Attorneys for Defendant Armstrong Cork Company,
15 Broad Street, New York, New York.
By (Signed) HORACE R. LAMB,
A member of said firm.

MESSRS. SMITH, BUCHANAN & INGERSOLL,
FRANK B. INGERSOLL,
1025 Union Trust Building, Pittsburgh, Pennsylvania,
WALTER F. KAUFMAN,
Lancaster, Pennsylvania,
of Counsel.

201 *Exhibit*

APPOINTMENT OF AGENT BETWEEN MASONITE CORPORATION, AS PRINCIPAL, AND ARMSTRONG CORK COMPANY, AGENT

Dated March 20, 1941

202 APPOINTMENT OF AGENT

Hardboard Products

Memorandum of agreement made and entered into as of March 20, 1941, by and between Masonite Corporation, a Delaware corporation (hereinafter called "Manufacturer") and Armstrong

Cork Company, a corporation of the State of Pennsylvania (hereinafter called "Agent"):

1. Appointment of Agent and Scope of Authority.—Manufacturer hereby appoints Agent a non-exclusive selling agent of Manufacturer with authority to sell hardboard products of the sizes and types hereinafter mentioned manufactured by Manufacturer under United States Letters Patent, to the classes of buyers hereinafter described, in the territory limited to continental United States including Alaska and the Hawaiian Islands, upon terms and conditions of sale to be prescribed from time to time by Manufacturer and for such period as hereinafter defined.

Agent hereby accepts appointment as agent of Manufacturer, with authority limited as aforesaid, and agrees to comply with and perform the terms and conditions to be performed on the part of Agent, as stated herein.

2. Classes of Buyers to Which Agent May Sell.—Agent is authorized to sell to the following classes of buyers who are engaged in distributing and reselling such products, to wit: (a) wholesalers approved as such by Manufacturer, (b) retail lumber and building material supply dealers and (c) reserve supply companies approved as such by Manufacturer. Agent may also sell direct to United States Government or any official department thereof. In addition, Agent may sell the hardboard products which Agent is authorized to sell hereunder to such
203 other and further classes of buyers of hardwood products, engaged in distributing and reselling such hardboard products, as Manufacturer may sell any of its hardboard products from time to time and to contractors or builders for building uses if Manufacturer shall adopt a policy of selling to such other classes of buyers, but in no event to industrial purchasers for their use in manufacturing or fabricating processes other than building; provided, however, that Agent may sell to such other and further classes of buyers only so long as Manufacturer shall engage in selling hardboard products to such other classes of buyers.

Agent has no authority to sell, transfer or dispose of hardboard products except as herein expressly provided; and Agent will not control or attempt to control the prices, terms or conditions upon which any buyer shall resell any hardboard products.

3. Products Agent Is Authorized to Sell.—Agent may sell all types and sizes of hardboard products manufactured and distributed by Manufacturer from time to time for sale to the classes of trade to which Agent is authorized to sell, and in the respective sizes, types and lengths as shown in Manufacturer's catalogues and price lists, provided, however, that Agent is not

authorized to sell (a) Special Tempered Concrete Form Board or (b) hardboard products (other than Century of Progress Flooring and Patterned Ceiling) which have been subjected to some additional processing, treatment or fabrication by Manufacturer, other than tempering, priming, coating, dyeing or coloring.

4. Prices, Terms and Conditions of Sale.—All sales and quotations shall be made by Agent at such prices and upon such terms, conditions and provisions as may be established by Manufacturer from time to time for the respective classes of buyers to which Agent is authorized to sell and as Manufacturer shall set
204 forth in its published catalogues and price lists from time to time, copies of which shall be furnished Agent promptly when issued.

Agent will not accept any order for sale or future delivery of hardboard hereunder which does not contain a reasonable force majeure clause approved by Manufacturer.

Agent is not authorized to make warranties or representations in connection with the sale of hardboard which may require Manufacturer to assume liability beyond Manufacturer's obligation to furnish to the buyer at Manufacturer's expense hardboard of the same size, grade, and quality originally ordered by buyer, to replace defective hardboard delivered to such buyer pursuant to such sale.

Manufacturer shall give Agent not less than 10 days' prior notice of the effective date of any increases in Manufacturer's selling prices and of any changes in terms, conditions, and provisions of sale and delivery in the event that such changes are less favorable than those then prevailing; and shall give Agent not less than 48 hours' prior notice of the effective date of any decrease in Manufacturer's selling prices or of any changes in the terms, conditions, and provisions of sale and delivery in the event that such changes are more favorable than those then prevailing. In any event, Manufacturer shall communicate such changes to Agent at the same time that Manufacturer informs any of its selling outlets of such changes, and Manufacturer shall promptly furnish Agent copies of all Manufacturers' published price lists wherein such changes are set forth.

In the event such increase or decrease is made, the provisions relating to such change, as contained in Manufacturer's applicable published catalogue and price list, shall be observed by Agent. Agent shall furnish Manufacturer inventories of consignment stocks as of the dates on which price changes become effective.

205 Agent shall not sell hardboard products on combined bids or in any other manner which does not fully disclose to the

buyer the prices, terms, and conditions of sale and delivery on which such hardboard products are offered for sale.

5. Consignment Stocks.—Manufacturer shall maintain at such of Agent's plants or warehouses as Agent may designate consignment stocks of hardboard products, the quantity of which, insofar as practicable, shall approximate two months' estimated deliveries on sales made by Agent from consignment stocks. All hardboard in consignment stocks shall be and remain the property of Manufacturer until ownership passes from Manufacturer to a buyer. Such consignment stock in the types and sizes as furnished by Manufacturer, until it shall be sold or disposed of in accordance with Agent's authority hereunder, shall be stored and housed by Agent in its plants or warehouses in such manner as to afford ready inspection and identification by Manufacturer, and any duly authorized representative of Manufacturer shall have access at all times during business hours to the place or places where said hardboard is so stored and held. Said products shall be kept properly segregated and identified as the property of Manufacturer, and Agent shall furnish and maintain suitable signs indicating the fact that the hardboard so stored is the property of Manufacturer. Agent shall not cut, fabricate, or process any consignment stock.

6. Return of Consignment Stocks.—Agent shall return to Manufacturer (at Manufacturer's expense) at any time when directed by it all or any part of the consignment stock which has not been sold. Agent shall return to Manufacturer (at Manufacturer's expense) all unsold hardboard in consignment stock, as well as all undistributed samples, within 10 days after the termination of the appointment of Agent.

206 7. Deliveries.—Agent is hereby authorized to make sales and deliveries from consignment stocks and to accept and transmit to Manufacturer orders for hard board products to be delivered direct by Manufacturer to buyers on orders obtained by Agent, but subject to the conditions and limitations herein provided.

8. Freight, Taxes, Insurance, Handling Expense, Etc.—Manufacturer shall pay freight charges from Manufacturer's plant at Laurel, Mississippi, to Agent's warehouses on all consignment stocks furnished Agent hereunder. Manufacturer shall also pay all taxes imposed upon consignment stocks and shall insure such consignment stocks against loss or damage by fire and other usual hazards. Agent shall pay all expenses for storage, cartage, transportation (except freight on original consignment stocks), and in addition all other costs, outlays, and expenses in connection with or incidental to, the handling of consignment stocks or the making of sales or deliveries therefrom; but Agent shall not be liable for

taxes, excises, fees, or other governmental charges which Manufacturer is required to absorb pursuant to any provision of law applicable to sales made hereunder.

9. Shipments.—All shipments, whether for consignment stocks or to buyers pursuant to orders obtained by Agent (shall be made from Manufacturer's plant at Laurel, Mississippi, loaded in railroad cars only. Manufacturer shall not be obligated to make shipments other than in amounts necessary to make or complete carlot quantities, but such carlot quantities may be diversified as between the various hard board products or such other products of the kind and character now or hereafter manufactured or distributed by Manufacturer, if, under railroad tariff classifications in effect at the time of shipment, the same may be combined with hard board products at the same freight rate or combined under any other conditions utilized by Manufacturer in its sales to any of its buyers of the classes to which Agent is authorized to sell.

207 10. Equal and Ratable Treatment.—Manufacturer shall secure to buyers obtained by Agent, as favorable treatment in respect of promptness in filling orders as is granted by Manufacturer to any other of its buyers of the classes to which Agent is authorized to sell hereunder. In event the aggregate demand for Manufacturers' hard board products from all sources is in excess of Manufacturer's capacity so as to require the scaling down of shipments, Manufacturer shall, during the time such condition exists, afford ratable treatment to Agent's orders by prorating all shipments of hard board products including shipments on orders obtained by Manufacturer's own employees (but not including Manufacturer's orders from industrial purchasers for (a) sizes less than 4' x 5' boards resulting from the normal accumulation of such lengths, (b) off-grade board, or (c) hard board products to be used in connection with fabrication or manufacturing processes for national defense, other than housing) on the basis of shipments made to buyers during the ninety (90) day period immediately preceding the commencement of such scaling down of shipments.

Manufacturer shall not grant to any agent authority to sell Manufacturer's hard board products to the classes of buyers to which Agent is authorized to sell hereunder which contains more favorable terms or provisions than are contained herein without extending the same to Agent hereunder, provided, however, that (a) the making or continuing by Manufacturer of different net compensation to offset geographical disadvantages, or (b) the making or continuing by Manufacturer of special concessions in good faith to settle litigation, shall not be deemed the granting of more favorable terms or conditions to any other agent.

11. Proceeds Held in Trust, Etc.—Sales of hardboard products may be made by Agent either in the name of Manufacturer or in

the name of Agent, as agent, provided such agency is dis-
208 closed. All hard board products which Agent is authorized to sell hereunder (whether shipped direct by Manufacturer on orders obtained by Agent or delivered from consignment stocks) shall remain the property of Manufacturer until ownership shall pass from Manufacturer to buyer, and no ownership in said hard board products shall vest in Agent at any time. The proceeds of all hard board sold shall be held in trust for the benefit and for the account of Manufacturer until fully accounted for as hereinafter provided.

12. Reports by Agent.—Agent shall render to Manufacturer not later than the 20th day of each month a report on forms provided by Manufacturer covering sales made by Agent during the preceding calendar month and a complete itemized report or inventory of all of Manufacturer's hardboard products on hand and in the custody of Agent at the close of the last day of business in the preceding calendar month. Agent shall also render at the termination of its appointment a similar report of all such hardboard products.

13. Remittances.—Not later than the 20th day of each calendar month Agent shall account for and remit to Manufacturer all amounts collected by Agent up to the end of the preceding calendar month as proceeds of the sale of hardboard products sold hereunder, after deducting therefrom the current commissions of Agent with respect to such products computed in the manner provided in Schedule A annexed hereto.

14. Examination of Agent's Accounts.—Agent shall keep complete and accurate records and books of account containing full data and information in respect of all of its transactions in connection with its handling, sale, and distribution of Manufacturer's hardboard products hereunder, and such books and records shall be open at all times during business hours to inspection and examination by Manufacturer.

209 15. Guaranties by Agent.—Agent guarantees the due and prompt payment to Manufacturer for all sales effected by Agent hereunder. On the 20th day of each calendar month Agent shall pay to Manufacturer any balance due Manufacturer with respect to any such guaranteed account which remained unpaid for a period of more than 60 days as at the last day of the preceding calendar month. Such payment shall constitute full performance of the guaranty of Agent in respect of the account so paid and thereupon Manufacturer shall assign all interest in such account to Agent.

Agent shall indemnify Manufacturer for all damages sustained in respect of hardboard lost, missing, or damaged while in custody of Agent as a result of the negligence of Agent.

16. Agent's Sales Efforts, etc.—Agent represents that at present it maintains and for a number of years it has maintained a nation-wide organization, skilled and trained in the selling, distributing, and promoting the use of building materials. Agent agrees that at all times while this agreement remains in effect it will utilize such organization (consistent with its other business) actively to promote the sale of Manufacturer's hardboard products throughout the territory and to the classes of trade in which and to which Agent is authorized to sell hereunder.

17. Marking, etc.—All hardboard products of Manufacturer (or the packages, if wrapped) which Agent is authorized to sell or may sell hereunder, including samples, may be labelled with Agent's trade-marks or trade names, provided the labels clearly disclose that with respect thereto Agent is acting solely as Agent for Manufacturer. Neither Agent nor Manufacturer shall assert any right or interest in any trade-marks or trade names of the other by reason of the existence of this agency.

210 Manufacturer may mark its hardboard products (or the packages, if wrapped) sold by Agent with such patent notice as it may be advised by counsel is necessary for its protection, but no such marking shall in any manner deface such hardboard products nor in any manner differ from the marking so used by Manufacturer on such hardboard products sold by Manufacturer on orders obtained by Manufacturer's employees.

18. Samples.—Manufacturer shall supply Agent, without cost to Agent, Manufacturer's standard sized samples (cut to size only) of the various hardboard products which Agent is authorized to sell hereunder in such quantities as Manufacturer may reasonably determine are required to promote the sale by Agent of hardboard products for Manufacturer. Agent shall acquire no title or ownership in samples.

19. Patent Indemnity.—Manufacturer hereby warrants that the hardboard products which Agent is authorized to sell hereunder, when used for the general purposes for which such hardboard products are customarily designed or intended, will not infringe any United States Letters Patent not owned or controlled, either directly or indirectly, by Manufacturer; and Manufacturer will save harmless and protect Agent, as well as Manufacturer's customers sold by Agent, against any claim or demand based on an alleged infringement of any such other United States Letters Patent. If Agent shall notify Manufacturer of the existence of such suit, Manufacturer shall appear and defend, at its own expense, any and all suits at law or in equity arising from such alleged infringement, provided always that Manufacturer shall have full control of the defense of any such suit.

20. Representation of Quality, etc.—Manufacturer agrees that all hardboard products in consignment stocks furnished to
211 Agent or delivered pursuant to orders obtained by Agent shall be of the grade and quality currently offered for sale by Manufacturer through its own employees to the classes of trade to which Agent is authorized to make sales.

21. Compensation.—For its services as Agent hereunder Manufacturer agrees to pay Agent compensation in respect of hardboard products sold by Agent at the rates set forth in Schedule A annexed hereto, and Agent, in making its remittances to Manufacturer, is authorized to deduct and retain the amounts of current commissions as provided in said Schedule.

22. Employee of Agent Not to be Employee of Manufacturer, etc.—Neither the making of this agreement, the acceptance of appointment of Agent hereunder, the performance of any of the provisions hereof, nor the making of any sales hereunder shall constitute or be construed as constituting any person employed by Agent an employee of Manufacturer for any purpose whatsoever

Agent shall indemnify and hold Manufacturer harmless against all loss and costs sustained by reason of damages to persons or property resulting from the negligent handling by Agent of consignment stocks of hardboard, including reasonable attorneys' fees and disbursements which Manufacturer may incur in defending any claim asserted against Manufacturer for such damages.

23. Term.—The term of this agency shall commence as of the date hereof and continue until March 20, 1945, provided that said term shall be automatically extended from year to year thereafter, subject, however, to (a) termination at any time by either party for cause as defined in Paragraph 24 hereof, or (b) termination by Agent at any time prior to March 20, 1945, by giving to Manufacturer not less than six (6) months' previous written notice of its intention so to do, or (c) termination on March 20, 1945,
212 or anytime thereafter, by either Manufacturer or Agent upon giving to the other not less than six (6) months' previous written notice of intention so to do. In event of the termination of this agency by notice, as provided herein, Manufacturer will not be required to make shipments on sales made by Agent or to Agent's consignment stocks at a rate in excess of Agent's average monthly shipments during the six months' period immediately preceding the receipt of the notice of termination.

24. Rights to Terminate.—Either party may terminate this Agreement by written notice to the other, upon the happening of any one or more of the following events:

(a) Failure of the other party to perform or comply with any of the provisions to be performed on its part hereunder; provided,

however, that in event of unintentional or inadvertent default the party concerned shall have the right to prevent such cancellation from going into effect by correcting or discontinuing such default within thirty days of the date on which the notice of default was mailed to it;

(b) The insolvency, receivership, or bankruptcy of the other party or an assignment by the other party for the benefit of its creditors;

(c) The filing and approval of a petition for the reorganization of the other party under the provisions of Chapter X of the Bankruptcy Act as now in force or as hereafter amended or under any similar act for the relief of debtors.

25. Right of Assignment.—This agreement and the appointment of Agent hereunder is personal in character and neither this Agreement nor any of the rights, interests, privileges or obligations hereunder shall be assignable or transferable by Agent without the express written consent of Manufacturer first had and obtained.

213 However, Manufacturer will consent to the assignment hereof, together with all rights and interests hereunder, to such concern as shall acquire all or substantially all of the assets and going business of Agent, provided such assignee by writte.. instrument shall accept appointment as successor agent hereunder, assume all obligations of Agent hereunder, and agree to be bound by all the terms and provisions hereof.

26. Superseding Previous Agency Agreements.—When this Agreement shall have been duly executed by the parties and delivered pursuant to authorization by each of the parties, this Agreement shall supersede in all respects the existing agreement between Manufacturer and Agent dated October 29, 1936, and any supplement or supplements thereto, which said agreement and said supplements shall thereby be and become terminated in all respects, anything therein to the contrary notwithstanding.

In witness whereof, the parties have executed this Agreement this 2nd day of April 1941, although to be effective as of the date and year first hereinabove written.

MASONITE CORPORATION,
By BEN ALEXANDER, *President.*

ARMSTRONG CORK CO.,
By H. R. PECK, *Vice President.*

214 *Schedule A—Agent's Compensation Schedule*

Column No. 1 of the following Schedule sets forth the percentages of Manufacturer's Dealer Carlot Prices for the respective types and sizes of hardboard products at which Agent's current commissions shall be computed. Such computation shall

be on said Dealer Carlot Prices in effect at the time of sale by Agent, and Agent will remit to Manufacturer only the entire difference between such Dealer Carlot Prices and the percentages thereof so computed; except that at the same time Agent makes a remittance to Manufacturer for hardboard products sold out of consignment stock Agent will also remit to Manufacturer an amount equal to the freight payments made by Manufacturer on account of the products so sold covering the original shipment of such products from Manufacturer's plant for such consignment stock.

Columns Nos. 2, 3, and 4 set forth the respective percentages by which the percentages appearing in Column No. 1 will be increased at the end of each of Manufacturer's fiscal years (August 31 of each year) and applied to the Dealer Carlot Prices in effect at the time of sale by Agent during such fiscal year if Agent's aggregate volume of sales for such year exceed 15,000,000 square feet, surface measurement, the applicable column to be determined by such aggregate volume of sales. Such excess annual commissions shall be computed and paid within sixty (60) days following the close of each such fiscal year.

With the exception of Manufacturer's hardboard products sold under its trade name of "Temprtile," no commission will be allowed on the increased Dealer Carlot Price of any hardboard product by reason of the fact that such product is tempered, and no commission will be allowed on the increased Dealer Carlot Price of any hardboard product by reason of the fact that such product is colored, dyed, primed, coated, or similarly processed or treated.

215 RATE OF COMPENSATION ON DIFFERENT ANNUAL SALES VOLUMES—SURFACE MEASUREMENT

	Base rate	Rates of additional compensation for quantity		
	No. 1 up to 15 million sq. ft.	No. 2 15 to 20 million sq. ft.	No. 3 20 to 25 million sq. ft.	No. 4 Over 25 million sq. ft.
Standards:				
¼" Presdwood	49%	1%	3%	4%
¼" Temprtile	49%	1%	3%	4%
5/16" Temprtile	49%	1%	3%	4%
5/16" Presdwood	43%	1%	3%	4%
¼" Presdwood	43%	1%	3%	4%
5/16" Presdwood	43%	1%	3%	4%
Quartrboard	36%	1%	1%	3%
Deluxe Quartrboard	36%	1%	1%	3%
5/16" Wallboard	36%	1%	1%	3%
Standards—Special Sizes:				
5/16" Wallboard	26%	1%	1%	3%
All others	31%	1%	1%	3%

A copy of this Document was served on me this day.

STANLEY E. DISNEY.

APRIL 16, 1941.

216 In District Court of the United States for the Southern District of New York

[Title omitted.]

Answer of Defendant Certain-teed Products Corporation

For answer to the complaint in the above-entitled cause, Certain-teed Products Corporation, one of the defendants herein, says:

1. This defendant denies that it, severally or jointly with any or more of the other defendants herein or otherwise, has violated or is violating Sections 1 and 2 of the Sherman Act or Section 3 of the Clayton Act as in said paragraph 1 alleged.

2. This defendant denies each and every averment contained in paragraph 2 of the complaint insofar as they or any of
217 them relate to this defendant, except that this defendant admits, for the purposes of this action only, that it and certain of the other defendants conduct business in the Southern District of New York and that interstate trade and commerce involved in the hard board industry are carried on in part within said district and this defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the remaining averments contained in said paragraph 2 of the complaint.

3. This defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 3 of the complaint.

4. This defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 4 of the complaint, except that this defendant admits that the defendant Celotex is the owner of 23.6% of the common stock of this defendant.

5. This defendant denies the averment contained in paragraph 5 of the complaint that the contract, dated October 29, 1936, between defendant Masonite and Hawaiian Cane Products, Ltd., was assigned to this defendant in 1937, but this defendant admits that part of the rights of Hawaiian Cane Products, Ltd., in and under said contract were assigned to this defendant in 1937, as more fully appears in paragraph 26 of this answer.

6. This defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 6 to 12, inclusive, of the complaint.

7. This defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 15 of the complaint.

218 8. This defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 18 to 33, inclusive, of the complaint.

9. This defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 34 of the complaint, except that this defendant admits that in the latter part of 1933 this defendant was distributing certain products manufactured by Hawaiian Cane Products, Ltd., and that this defendant had facilities for the distribution of building materials in certain portions of the United States.

10. This defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 35 of the complaint.

11. This defendant denies each and every averment contained in paragraph 36 of the complaint insofar as they or any of them relate to this defendant, and this defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the remaining averments contained in said paragraph 36 of the complaint.

12. This defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 37 of the complaint.

13. This defendant denies each and every averment contained in paragraphs 38, 39, and 40 of the complaint insofar as they or any of them relate to this defendant, and this defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the remaining averments contained in said paragraphs 38, 39, and 40 of the complaint.

219 14. This defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 41 to 48, inclusive, of the complaint.

15. This defendant denies each and every averment contained in paragraph 49 of the complaint insofar as they or any of them relate to this defendant and upon information and belief this defendant denies each and every averment contained in said paragraph 49 of the complaint insofar as they or any of them relate to Hawaiian Cane Products, Ltd., and this defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the remaining averments contained in said paragraph 49 of the complaint.

16. This defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 50 to 60, inclusive, of the complaint.

17. Upon information and belief this defendant denies each and every averment contained in paragraph 61 of the complaint, except that this defendant admits upon information and belief that Masonite and Hawaiian Cane Products, Ltd., on December 4, 1933, entered into an agreement entitled "Agency Agreement and License Option."

18. Upon information and belief this defendant denies each and every averment contained in paragraphs 62 and 63 of the complaint except insofar as said averments correctly state the terms of said Agency Agreement and License Option, dated December 4, 1933, and referred to in paragraph 61 of the complaint, for the exact terms of which reference is hereby made to the original thereof.

19. This defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 64 to 76, inclusive, of the complaint.

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20. Upon information and belief this defendant denies each and every averment contained in paragraph 77 of the complaint insofar as they or any of them relate to Hawaiian Cane Products, Ltd., and this defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the remaining averments contained in paragraph 77 of the complaint.

21. As to the averments contained in paragraph 78 of the complaint, this defendant admits upon information and belief that the agreement referred to in paragraph 61 of the complaint between Masonite and Hawaiian Cane Products, Ltd., dated December 4, 1933, is designated "Agency Agreement and License Option" and denies upon information and belief the averment that said agreement was not an agency agreement and further denies upon information and belief that it was intended by Masonite and Hawaiian Cane Products, Ltd., to circumvent and defeat the provisions of the Anti-trust Laws as in the complaint set forth and this defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the remaining averments contained in said paragraph 78 of the complaint.

22. Upon information and belief this defendant denies each and every averment contained in paragraph 79 of the complaint insofar as they or any of them relate to Hawaiian Cane Products, Ltd., and this defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the remaintaining averment contained in said paragraph 78 of the complaint.

23. This defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the
221 averments contained in paragraphs 80 and 81 of the complaint.

24. As to the averments contained in paragraph 82 of the complaint, this defendant admits upon information and belief that on October 29, 1936, Masonite and Hawaiian Cane Products, Ltd., entered into a new agreement and a supplemental agreement and that the agreement between the same parties, dated December 4, 1933, was thereupon cancelled, and upon information and belief this defendant denies that the entering into of said agreement on October 29, 1936, and the supplemental agreement entered into on the same date, were in furtherance of any unlawful conspiracy alleged in the complaint or otherwise; and this defendant admits that certain rights of Hawaiian Cane Products, Ltd., under said agreement dated October 29, 1936, and the supplemental agreement entered into on the same date, were assigned to this defendant in 1937; and this defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the remaining averments contained in said paragraph 82 of the complaint.

25. Upon information and belief this defendant denies each and every averment contained in paragraphs 83 and 84 of the complaint insofar as said averments relate to the agreement entered into between Masonite and Hawaiian Cane Products, Ltd., on October 29, 1936, and the supplemental agreement entered into on the same day, except to the extent that said averments correctly state the terms of said agreement and such supplemental agreement, for the exact terms of which reference is hereby made to the originals thereof, and this defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the remaining averments contained in said paragraphs 83 and 84 of the complaint.

222 26. This defendant denies each and every averment contained in paragraph 85 of the complaint, except that this defendant admits that Hawaiian Cane Products, Ltd., did, by virtue of a certain agreement, dated January 30, 1937, entered into by and between Hawaiian Cane Products, Ltd., and Masonite and this defendant, assign to this defendant upon certain conditions all of its rights and interest under its del credere factor's agreemet with Masonite, dated October 29, 1936, applicable to the sale and distribution of Masonite hardboard products as specified in said del credere factor's agreement throughout the continental United States, including Alaska but excluding the Hawaiian Islands; and that this defendant accepted such assignment and assumed all such obligations, liabilities, and duties

imposed on Hawaiian Cane Products, Ltd., by the terms and provisions of said del credere factor's agreement so far as applicable to the sale and distribution of Masonite's hardboard products thereunder throughout the continental United States, including Alaska; and in and by paragraph 7 of said agreement, the parties thereto expressly agreed that nothing therein contained should be deemed or construed to constitute this defendant as a del credere factor of Masonite, it being understood that this defendant was acting only as the selling agent for Hawaiian Cane Products, Ltd., and that the consent of Masonite to said assignment and to other terms contained in said agreement dated January 30, 1937, was given solely as a matter of convenience to Hawaiian Cane Products, Ltd., in the handling of its account as in said agreement stated, the original of which agreement this defendant stands ready to produce upon the trial of this cause.

27. This defendant denies each and every averment contained in paragraph 86 of the complaint insofar as they or any of them
223 relate to this defendant, and upon information and belief this defendant denies each and every averment contained in said paragraph 86 of the complaint insofar as they or any of them relate to Hawaiian Cane Products, Ltd.; and this defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the remaining averments contained in said paragraph 86 of the complaint.

28. This defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 87 and 88 of the complaint.

29. This defendant denies each and every averment contained in paragraph 89 of the complaint insofar as they or any of them relate to this defendant and this defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the remaining averments contained in said paragraph 89 of the complaint.

30. This defendant denies each and every averment contained in paragraphs 90 and 91 of the complaint insofar as they or any of them relate to this defendant, except to the extent that such averments describe a course of conduct by this defendant in conformity with the terms and conditions of the obligations assumed by this defendant under and by reason of the assignment, dated January 30, 1937, by Hawaiian Cane Products, Ltd., to this defendant of certain rights under said del credere factor's agreement, dated October 29, 1936, and the supplemental agreement entered into the same day, between Masonite and Hawaiian Cane Products, Ltd., and this defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the remaining averments contained in said paragraphs 90 and 91

of the complaint. This defendant further says that what-
224 ever was done by this defendant in the selling of hard-
board was all in accordance with the terms and conditions of said assignment agreement of January 30, 1937, and the del credere factor's agreement therein mentioned, and that the terms, conditions, and provisions of said agreement were, under the law, within the rights and powers of said Masonite as owner of letters patent for the manufacture and sale of hardboard and within the rights and powers of this defendant and the said Hawaiian Cane Products, Ltd., as the agents of Masonite as owner of said letters patent; and this defendant says that, in carrying out the terms and provisions of said agreements, nothing was done by Masonite as the owner of said letters patent and said hardboard not authorized by the patent laws of the United States or the law of the land, and nothing was done by this defendant that was not within its legal rights and authorized by the law of the land; and this defendant alleges that none of its acts under said assignment dated January 30, 1937, were done pursuant to or because of any unlawful combinations, agreements, understandings, or conspiracies in restraint of trade or commerce or in violation of any of the terms and provisions of the Anti-trust Laws of the United States.

31. This defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 92 and 93 of the complaint.

32. This defendant denies each and every averment contained in paragraph 94 of the complaint in so far as they or any of them relate to this defendant and this defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the remaining averments contained in said paragraph 94 of the complaint.

33. This defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the
225 averments contained in paragraphs 95 to 99 inclusive of the complaint.

34. This defendant denies each and every averment contained in paragraphs 100, 101, and 102 of the complaint in so far as they or any of them relate to this defendant; and this defendant says that it is without knowledge or information sufficient to form a belief as to the remaining averments contained in said paragraphs 100, 101, and 102 of the complaint.

35. This defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 103 and 104 of the complaint.

36. This defendant denies each and every averment contained in paragraph 105 of the complaint in so far as they or any of

them relate to this defendant and this defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the remaining averments contained in said paragraph 105 of the complaint.

37. This defendant denies each and every averment contained in paragraph 106 of the complaint in so far as they or any of them relate to this defendant, except to the extent that said averments correctly state the terms of the del credere factor's agreement between Hawaiian Cane Products, Ltd., and Masonite, dated October 29, 1936, and the supplemental agreement thereto, all as referred to in said assignment from Hawaiian Cane Products, Ltd., to this defendant, dated January 30, 1937, for the exact terms of which reference is hereby made to the originals thereof; and this defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the remaining averments contained in said paragraph 106 of the complaint.

226 38. This defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 107 of the complaint.

39. Upon information and belief this defendant denies each and every averment contained in paragraph 108 of the complaint in so far as they or any of them relate to the agreements referred to in the complaint to which this defendant is a party or under which it has any rights, and this defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the remaining averments contained in paragraph 108 of the complaint.

40. This defendant denies each and every averment contained in paragraph 109 of the complaint in so far as they or any of them relate to this defendant, and this defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the remaining averments contained in said paragraph 109 of the complaint and this defendant further says that the Agency Agreement and License Option, dated December 4, 1933, and the del credere factor's agreement and supplement thereto, dated October 29, 1936, between Masonite and Hawaiian Cane Products, Ltd., and the said agreement between said Hawaiian Cane Products, Masonite and this defendant, dated January 30, 1937, were not, nor were either or any of them, unlawful or invalid agreements and that the execution and performance of said agreements and each of them, and all acts and things done thereunder or otherwise by the respective parties thereto were not pursuant to or in promotion or furtherance of any unlawful understanding, combination, purpose, agreement, monopoly or conspiracy between this defendant and

said other defendants or any of them, or any person what-
227 soever in the creation or maintenance of any monopoly or attempt to monopolize or in the restraint of trade and commerce among the several States of the United States in violation of the said Sherman Act and the said Clayton Act, or either of said acts, or in any respect contrary to or in violation of the anti-trust laws of the United States.

Wherefore, this defendant prays that the relief prayed for in the complaint be denied and defendant further prays judgment that the complaint of plaintiff be dismissed with costs to defendant.

Dated, May 16, 1940.

HUGHES, RICHARDS, HUBBARD & EWING,
By OSCAR R. EWING, *A Member of said Firm,*
1 Wall Street, New York, N. Y.,
Attorneys for Certain-teed Products Corporation.

OSCAR R. EWING,
WILLIAM T. GOSSETT,
1 Wall Street, New York, N. Y.
LEONARD B. ETTELSON,
STEPHEN J. ALLIE,
EDWARD C. HIGGINS,
ERWIN M. TREUSCH,
120 South La Salle St., Chicago, Illinois,
Of Counsel.

228 [*Duly sworn to by Arthur O. Graves; jurat omitted in printing.*]

229 In District Court of United States for the Southern District of New York

Supplemental answer of Certain-teed Products Corporation

As and for a supplemental answer to the complaint herein and as and for a separate and complete defense thereto, Certain-teed Products Corporation, one of the defendants herein, alleges:

1. Subsequent to the serving and filing of the answer herein by this defendant, the agreement referred to in the original answer of this defendant between the defendant Masonite Corporation and Hawaiian Cane Products, Ltd., was cancelled and
230 terminated, and as of March 20, 1941, this defendant entered into a new agreement with the defendant Masonite Corporation, which agreement was in the form of the agreement annexed to, marked Exhibit "A" and made a part of the supplemental answer of said Masonite Corporation filed herein, which said Exhibit "A" is hereby incorporated herein by reference and made a part hereof. Said agreement, hereinafter referred

to as the "new agreement," is now in full force and effect and the parties are acting thereunder; it cancels and terminates and completely supersedes and replaces as of March 20, 1941, any and all pre-existing agreements between the parties thereto relating to the manufacture, distribution or sale of the various products of the defendant Masonite Corporation, known as "hardboard."

2. Except for the new agreement, there is no agreement, understanding or arrangement, express or implied, written or oral, of any nature whatsoever, between said defendant Masonite Corporation and this defendant, with respect to the manufacture or distribution of hardboard or related or competing products or any other product manufactured or distributed by Masonite Corporation or this defendant or any subsidiary or affiliated corporation of either.

3. In entering into the new agreement and in making this supplemental answer to the complaint herein, this defendant had and has no intention of withdrawing, altering, or qualifying in any respect whatever any of the denials or allegations made by it in its original answer herein, or of admitting, expressly or by implication, the illegality or impropriety to any extent whatsoever of any previously existing agreement or arrangement between this defendant and Masonite Corporation and Hawaiian Cane Products, Ltd., or any of them; but on the contrary, this defendant reaffirms and realleges said denials and allegations.

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4. On or about March 26, 1941, counsel for the defendant Masonite Corporation and counsel for certain other defendants herein, including this defendant, presented to and filed with an assistant to the Attorney General of the United States of America several copies of a proposed agreement in the form of the new agreement, and informed said assistant to the Attorney General that said Masonite Corporation was about to make an agreement in such form with each of the other defendants. Said assistant to the Attorney General declined to express any opinion with respect thereto, but expressed no opposition to the making of agreements in such form; and it was thereupon agreed that a supplemental answer or answers relating to the making of said new agreements might be served as a matter of course and without further notice by the defendants, and that the United States of America might serve and file as a matter of course a supplemental pleading in rejoinder if the Attorney General so desired.

5. Prior to the acquisition by this defendant on January 30, 1937, of certain rights of Hawaiian Cane Products, Ltd. under its agreement with the defendant Masonite Corporation, referred to in its original answer, this defendant believed and still believes that the defendant Masonite Corporation, as the holder of United

States letters patent, duly adjudicated as valid by the United States Circuit Court of Appeals for the Third Circuit,
232 covering the processes used in the manufacture of hardboard and the resulting product, had the right to manufacture, use, and sell the articles covered by said patent and the right to prevent others from exercising like privileges without its consent. Desiring to secure for itself the right to sell and distribute hardboard products to its customers, this defendant acquired the rights of said Hawaiian Cane Products, Ltd. to distribute hardboard within continental United States and Alaska under a pre-existing del credere agency agreement between said Masonite Corporation and said Hawaiian Cane Products, Ltd. Subsequently, the Government having criticized said del credere agency agreement as a mere device to create a simulated and not a genuine del credere agency factor of relationship, this defendant, while disagreeing with these allegations, entered into the aforesaid new agreement with the defendant Masonite Corporation in order to remove any possible controversy as to the true nature of the relationship between said defendant and this defendant and at the same time preserve the right of this defendant to supply its customers with hardboard. This defendant believes that the existing arrangement represents the only terms upon which the defendant Masonite Corporation will permit this defendant to sell or distribute hardboard products and that if such arrangement is not continued in effect this defendant may be excluded entirely from the sale or distribution of hardboard products.

6. The new agreement was not made, and no action has been taken or shall be taken thereunder, pursuant to, in conformity with, by reason or with knowledge of, any unlawful monopoly,
attempt to monopolize, combination or consipracy to
233 moncpolize or any combination, agreement, understanding, or conspiracy in restraint of trade or commerce or in violation of the anti-trust laws of the United States.

7. In the sale and distribution of hardboard, this defendant proposes to act as the agent of the defendant Masonite Corporation under and pursuant to the terms, conditions, and provisions of the new agreement, and not otherwise, except as such agreement may hereafter be lawfully modified; the provisions of the new agreement relating to the defendant Masonite Corporation are within the legal rights and powers of said corporation as the owner of United States letters patent covering the processes of manufacture of hardboard and the resulting product and as the manufacturer of such hardboard, and the provisions of the new agreement relating to this defendant are within the legal rights and powers of this defendant as the agent of said Masonite Cor-

poration; and in carrying out the terms and provisions of the new agreement nothing will be done by this defendant in violation of the laws of the United States.

8. It is the intention of this defendant to observe fully and completely, in letter and in spirit and in the utmost good faith, all of the terms, conditions, and provisions of the new agreement, insofar as the same are applicable to this defendant, and this defendant hereby disclaims any intention at any future time to reinstate any preexisting agreement cancelled and terminated by the new agreement.

9. By reason of the foregoing facts, no decree of this Court consistent with the pl. ings and the existing facts
234 as hereinbefore alleged will benefit the plaintiff herein as against this defendant and therefore it will serve no useful purpose for the Court to proceed with the trial of this suit.

Wherefore, this defendant prays that the relief demanded in the complaint be denied and that the suit be dismissed as against this defendant.

Dated April 12, 1941.

HUGHES, RICHARDS, HUBBARD & EWING,
By OSCAR R. EWING,
A Member of said Firm,
One Wall Street, New York, N. Y.,
Attorneys for Certain-teed Products Corporation.

OSCAR R. EWING,
WILLIAM T. GOSSETT,
One Wall Street, New York, N. Y.
LEONARD B. ETTELSON,
STEPHEN J. ALLIE,
EDWARD C. HIGGINS,
ERWIN M. TREUSCH,
120 South La Salle St., Chicago, Illinois,
Of Counsel.

235 In District Court of the United States for the Southern District of New York

[Title omitted.]

Answer of Defendant National Gypsum Company

Now comes National Gypsum Company, hereinafter referred to as "this Defendant" and for answer to the complaint of the Plaintiff filed herein admits, denies, and alleges as hereinafter set forth:

1. Admits that the complaint is filed and that these proceedings are instituted under Section 4 of the Sherman Anti-Trust Act and under Section 15 of the Clayton Act in order to prevent alleged violations of Section 1 and 2 of the Sherman Act and Section 3

of the Clayton Act; but denies any violation or attempted violation in any manner whatsoever of said Sections 1 and 2 of the Sherman Act and said Section 3 of the Clayton Act or either or any of them.

2. Denies each and every allegation contained in paragraph 2 of the complaint, except that it admits that it conducts business within the Southern District of New York, including interstate trade and commerce in hardboard manufactured by the
236 defendant Masonite and alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the complaint in so far as it relates to the places where all other defendants conduct business and carry on interstate trade and commerce.

3. Admits on information and belief that the defendant Masonite is a Corporation organized and existing under the laws of the State of Delaware with its principal office at Chicago, Ill., and its manufacturing plant at Laurel, Mississippi, and alleges that it is without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in paragraph 3 of the complaint.

4. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 4, 5, 6, 7, 8, 10, 11, and 12 of the complaint.

5. Admits the allegations contained in paragraph 9 of the complaint, except that it alleges that this Defendant was organized in 1925.

6. Alleges that certain hardboard products known as "Quartrboard," and "Presdwood" are used in the building industry but except as in this paragraph set forth, alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 13, 14, and 15 of the complaint.

7. Admits on information and belief the allegation contained in paragraph 16 of the complaint.

8. Admits that defendant Masonite's hardboard products have been marketed under certain trade names such as "Quartr-
237 board," "Presdwood" and "Temprtile" but, except as in this paragraph set forth, alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, and 33 of the complaint.

9. Admits the allegations contained in paragraph 31 of the complaint.

10. Denies each and every allegation contained in paragraph 34 of the complaint in so far as it relates to this defendant; and alleges that it is without knowledge or information sufficient to

form a belief as to the truth of all other allegations contained in paragraph 34 of the complaint.

11. Denies each and every allegation contained in paragraph 36 of the complaint.

12. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 35 and 37 of the complaint.

13. Denies each and every allegation contained in paragraphs 38, 39, and 40 of the complaint.

14. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 41 and 42 of the complaint.

15. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 43 of the complaint, except that it admits
238 on information and belief that the defendants Masonite and Celotex entered into certain agreements on or about October 10, 1933.

16. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 44, 45, 46, 47, and 48 of the complaint.

17. Denies each and every allegation contained in paragraph 49 of the complaint.

18. Denies each and every allegation contained in paragraph 50 of the complaint, but admits that it entered into an agreement with the defendant Masonite, dated October 31, 1933, and entitled "Agency Agreement and License Option."

19. Denies that the true and correct contents, meaning, terms and effect of agreement referred to in paragraph 51 of the complaint are as therein alleged.

20. Denies each and every allegation contained in paragraph 52 of the complaint.

21. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, and 76 of the complaint, except that it admits on information and belief that the defendant Masonite entered into certain agreements with the defendants, Johns-Manville Sales, Armstrong, Hawaiian Cane Products, Ltd., Wood Conversion, Insulite and Agasote, dated respectively, November 30, 1933, December 1, 1933, December 4, 1933, June 25, 1934, February 2 and 8, 1935, and January 4, 1934.

239 22. Denies each and every allegation of paragraph 77 of the complaint insofar as it relates or refers to this Defendant, and insofar as it refers or relates to other defend-

ants, alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 77 of the complaint.

23. Denies each and every allegation contained in paragraph 78 of the complaint and alleges that pursuant to the agreements referred to in paragraph 50 of the complaint this Defendant was appointed as the del credere factor or agent of the defendant Masonite.

24. Denies each and every allegation contained in paragraph 79 of the complaint.

25. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 80 and 81 of the complaint.

26. Denies each and every allegation contained in paragraph 82 of the complaint, except that it admits that the Defendant entered into new agreements dated October 29, 1936, with the defendant Masonite, which were substituted for the agreement of October 31, 1933, and admits on information and belief that the defendant Masonite on or about October 29, 1936, entered into new agreements with the other defendants named in said paragraph 82.

27. Denies that the true and correct contents, meaning, terms, and effect of the agreements referred to in paragraph 83 of the complaint are as therein stated.

28. Denies each and every allegation contained in paragraphs 84 and 86 of the complaint.

240 29. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 85, 87, 88, and 89 of the complaint; and specifically denies that there existed at any time any conspiracy, monopoly, or combination in restraint of trade.

30. Insofar as the allegations of paragraph 90 of the complaint refer or relate to this Defendant, denies each and every allegation except that it admits the allegations contained in clauses (a), (b), (c), and (d) and specifically denies that any of said acts were done pursuant to or as part of any conspiracy, monopoly, or combination in restraint of trade; insofar as the allegations of paragraph 90 of the complaint refer or relate to defendants other than this Defendant, alleges that it is without knowledge or information sufficient to form a belief as to the truth of said allegations.

31. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 91 of the complaint, and specifically denies that any acts such as those set forth in paragraph 91 of the complaint, if

done, were done pursuant to or as part of any conspiracy, monopoly, or combination in restraint of trade.

32. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 92 and 93 of the complaint.

33. Denies each and every allegation contained in paragraph 94 of the complaint.

34. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 95, 96, 97, 98, and 99 of the complaint.

241 35. Denies each and every allegation contained in paragraphs 100, 101, and 102 of the complaint.

36. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 103 and 104 of the complaint.

37. Denies each and every allegation contained in paragraph 105 of the complaint.

38. Denies each and every allegation contained in paragraph 106 of the complaint and alleges that the true and correct meaning and effect of the del credere agreements referred to in said paragraph are not therein correctly stated.

39. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 107 of the complaint.

40. Denies each and every allegation contained in paragraph 108 of the complaint.

41. Denies each and every allegation contained in paragraph 109 of the complaint, and specifically denies having established, maintained or been a party to any conspiracy, monopoly, or combination in restraint of trade by means of acts therein alleged or any other acts, and specifically denies that it has committed or been a party to the alleged illegal acts therein referred to, or any of them.

42. Denies generally that it has ever entered into, or in any manner is or has been a party to, any agreement, combination, or conspiracy of any kind whatsoever in violation of the Anti-Trust laws or any other laws of the United States, and denies that it is or ever has been a party to any unlawful agree-

242 ment, combination, or conspiracy in restraint of trade or otherwise; and specifically denies any violation or attempted violation in any manner whatsoever of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, or either or any of them.

43. Denies each and every allegation contained in the complaint not hereinbefore admitted, controverted, explained or specifically denied.

Wherefore, Defendant National Gypsum Company prays that this suit be dismissed.

Dated Buffalo, N. Y., April 26, 1940.

ELMER E. FINCK,
804 Liberty Bank Building, Buffalo, N. Y.,
Attorney for Defendant National Gypsum Company.

JOHN F. HUBER, Jr.,
804 Liberty Bank Building, Buffalo, N. Y.,
Of Counsel.

HENRY K. URION,
120 Broadway, New York, N. Y.,
Of Counsel and person upon whom service of all papers shall be made.

243 [*Duly sworn to by Melvin H. Baker; jurat omitted in printing.*]

244 In District Court of the United States, Southern District of New York

Supplemental answer of the National Gypsum Company

As a supplemental answer to the complaint herein and by way of an additional, separate, and complete defense, and partial defense, to the cause of action set forth in the complaint herein, National Gypsum Company alleges:

1. As of March 20, 1941, the defendant, Masonite Corporation, and the defendant, National Gypsum Company, entered into an agreement in writing in the same form and substance as the agreement, marked Exhibit "A," which is annexed to and made a part of the supplemental answer of Masonite Corporation filed in this cause, to which said Exhibit "A" reference is hereby made and the same is hereby incorporated herein by reference and made a part hereof as fully and as completely as though herein set forth at length. Said new agreement completely supersedes and replaces any and all pre-existing agreements between said parties relating to the manufacture, distribution, and sale of the various products of Masonite Corporation known as hardboard. Said new agreement is now and as of March 20, 1941, has been, in full force and effect.

245 2. This defendant is serving this supplemental answer in order that the said new agreement and the making thereof may be brought within the scope and purview of the present action, for judgment and determination by the Court as to the complete lawfulness thereof, and for such effect in connection with the disposition and dismissal of the present suit as may be lawful.

3. In making said new agreement and this supplemental answer, this defendant had and has no intention of withdrawing, altering,

or qualifying in any respect any of the denials or allegations made by it in its original answer herein, or of admitting, expressly or by implication, any of the charges or allegations in the complaint, or the illegality or impropriety to any extent whatsoever of any action by it or by any of the defendants or of any prior agreement or arrangement between it and Masonite Corporation. On the contrary, this defendant expressly affirms and realleges all the denials and allegations contained in its present answer.

4. It is also the purpose and intent of this defendant to observe fully and completely in letter and in spirit and in the utmost good faith all the terms and conditions and provisions of the new agreement between this defendant and Masonite Corporation. This defendant hereby disclaims and denies any intention at any future time to reinstate any pre-existing agreement cancelled and terminated by the said new agreement.

5. By reason of the execution and delivery of said new agency agreement and the termination of the said del credere agreement, dated October 29, 1936, and all supplements thereto, between this defendant and Masonite Corporation, it would serve no useful purpose for the Court to proceed with the trial of this cause.

246 Wherefore, National Gypsum Company prays that the relief demanded in the complaint be denied and that the suit be dismissed as against this defendant.

HENRY K. URION,
Attorney for Defendant,
National Gypsum Company,
No. 120 Broadway, New York, N. Y.

ELMER E. FINCK,
JOHN F. HUBER, JR.,
804 Liberty Bank Bldg., Buffalo, New York,
Of Counsel.

Service of this document made on me.

STANLEY E. DISNEY.

APRIL 17, 1940.

247 In District Court of the United States for the Southern District of New York

[Title omitted.]

Answer of Defendant, Dant & Russell, Inc.

Now comes Dant & Russell, Inc., hereinafter sometimes referred to as "this defendant," and for answer to the complaint of the plaintiff filed herein admits, denies, and alleges as hereinafter set forth:

1. Admits that the complaint is filed and that these proceedings

are instituted under Section 4 of the Sherman Anti-Trust Act and under Section 15 of the Clayton Act in order to prevent alleged violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act; but denies any violation or attempted violation in any manner whatsoever of said Sections 1 and 2 of the Sherman Act and said Section 3 of the Clayton Act or either or any of them.

2. Denies each and every allegation contained in paragraph 2 of the complaint, except that it admits that certain
248 of the defendants conduct their business and are found within the Southern District of New York and that hardboard is sold in interstate commerce in part within said District.

3. Admits, on information and belief, that defendant, Masonite Corporation, is a corporation organized and existing under the laws of the State of Delaware, with its principal office at Chicago, Illinois, and its manufacturing plant at Laurel, Mississippi, but alleges that it is without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in paragraph 3 of the complaint.

4. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 4 to 11, inclusive, of the complaint.

5. Admits the allegations contained in paragraphs 12, 13, and 14 of the complaint and alleges that the term "hardboard" is universally understood to refer to the products made by defendant, Masonite Corporation, under its patents.

6. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 15 of the complaint.

7. Admits the allegations contained in paragraphs 16 and 17 of the complaint.

8. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 18 to 35, inclusive, of the complaint.

9. Denies each and every allegation contained in paragraph 36 of the complaint.

249 10. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 37 of the complaint.

11. Denies each and every alegation contained in paragraphs 38 to 40 inclusive of the complaint.

12. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 41 to 48 inclusive of the complaint.

13. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in

paragraphs 49 to 86 inclusive of the complaint, but specifically denies that there existed at any time any monopoly, combination in restraint of trade or any unlawful conspiracy as alleged in said paragraphs 49 to 86 inclusive of the complaint.

14. Denies each and every allegation contained in paragraph 87 of the complaint.

15. Denies that the true contents, meaning and legal effect of the agreements referred to in paragraph 88 of the complaint are as therein stated; and for greater certainty with reference to the meaning, terms and effect thereof, this defendant refers to the original agreements with the same force and effect as if they were set forth here at length.

16. Denies each and every allegation contained in paragraph 89 of the complaint.

17. Denies each and every allegation contained in paragraph 90 of the complaint insofar as it refers or purports to refer to any agreement or understanding entered into or made by this defendant with the defendant, Masonite Corporation; and insofar as said allegations refer or purport to refer to any agreements or understandings between the defendants other than this defedant with the defendant, Masonite Corporation, this defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of said allegations.

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18. Denies each and every allegation contained in paragraph 91 of the complaint insofar as it refers or purports to refer to agreements or understandings entered into by this defendant with the defendant, Masonite Corporation, except that this defendant admits that hardboard, sold by this defendant, as agent or factor for the defendant, Masonite Corporation, under the terms, provisions, and conditions of the "Del Credere Factor's Agreement," entered into with the defendant, Masonite Corporation, on June 19th, 1937, was manufactured by the defendant, Masonite Corporation, and that the functions performed by this defendant as del credere agent or factor for the defendant, Masonite Corporation, in the sale of such hardboard as such del credere agent or factor have been governed by the provisions of said agreement and as from time to time prescribed thereunder by the defendant, Masonite Corporation, as the manufacturer or principal named in said agreement and under which agreement this defendant is designated as a del credere agent or factor; and insofar as said allegations refer or purport to refer to agreements or understandings entered into by defendants other than this defendant with the defendant, Masonite Corporation, this defendant is without knowledge or information sufficient to form a belief as to the truth of said allegations.

19. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 92 and 93 of the complaint.

20. Denies each and every allegation contained in paragraph 94 of the complaint.

251 21. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 95 to 99 inclusive of the complaint.

22. Denies each and every allegation contained in paragraphs 100 to 102 inclusive of the complaint.

23. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 103 of the complaint.

24. Admits the allegation contained in the first sentence of paragraph 104 of the complaint and alleges that it is without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in paragraph 104 of the complaint.

25. Denies each and every allegation contained in paragraph 105 of the complaint.

26. Denies each and every allegation contained in paragraph 106 of the complaint, and alleges that all the conclusions and characterizations therein contained as to important features of the del credere factor agreements are not correctly stated, and for greater certainty and accuracy the defendant refers to the actual terms of said agreements.

27. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 107 of the complaint.

28. Denies each and every allegation contained in paragraph 108 of the complaint.

29. Denies each and every allegation contained in paragraph 109 of the complaint and specifically denies having established, maintained, or been a party to any conspiracy, monopoly,
252 or combination in restraint of trade by means of act therein alleged, or any other acts, and specifically denies that it has committed the alleged illegal acts therein referred to, or any of them.

30. Denies each and every allegation in the complaint not hereinbefore admitted, controverted or explained, or specifically denied.

Wherefore, defendant, Dant & Russell, Inc., prays that this suit be dismissed.

LAWRENCE C. HULL, Jr.,
25 Broad Street, New York, New York,
Attorney for Defendant, Dant & Russell, Inc.

253 In District Court of the United States for the Southern District of New York

[Title omitted.]

Answer of Defendant Wood Conversion Company

Now comes Wood Conversion Company and for its answer to the complaint of the plaintiff filed herein admits, denies, and avers as hereinafter set forth. This defendant, for the purposes of this answer, adopts the short names of the various defendants used by the plaintiff in the complaint. The averments of each numbered paragraph of the complaint are answered in a paragraph with a corresponding number.

1. This defendant admits that the complaint is filed, and that these proceedings are instituted under Section 4 of the Sherman Anti-Trust Act, and under Section 15 of the Clayton Act, in order to prevent alleged violations of Sections 1 and 2 of the
254 Sherman Act, and Section 3 of the Clayton Act; but this defendant denies that it has violated, or attempted to violate, in any manner whatsoever, said Sections 1 and 2 of the Sherman Act, or said Section 3 of the Clayton Act, or any of them.

2. This defendant denies that it has participated in or been a party to any unlawful act or violation mentioned, referred to, or alleged in the complaint, or implied from the allegations thereof; denies that it has participated in, or been a party to, any unlawful monopoly, attempt to monopolize, combination, or conspiracy to monopolize by contract or otherwise, to restrain trade or commerce among the several states of the United States, including the State of New York; denies that it has participated in, or been a party to, any unlawful act, violation, unlawful monopoly, attempt to monopolize, combination, or conspiracy to monopolize, or to any contract, combination, or conspiracy to restrain trade or commerce alleged to have been carried out or made effective, or alleged to be now carried out or made effective, in anywise within the Southern District of New York; and denies that it has performed, by its representative or representatives, or otherwise, any unlawful act mentioned, referred to, or alleged in, or implied from the allegations of, the complaint or otherwise in said District. As to the truth of the other averments contained in paragraph 2 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

3. This defendant admits that Masonite has its manufacturing plant at Laurel, Mississippi, and that it has an office at Chicago, Illinois. As to the truth of the other averments contained in paragraph 3 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

4. As to the truth of the averments contained in paragraph 4 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

5. As to the truth of the averments contained in paragraph 5 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

255 6. As to the truth of the averments contained in paragraph 6 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

7. As to the truth of the averments contained in paragraph 7 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

8. As to the truth of the averments contained in paragraph 8 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

9. As to the truth of the averments contained in paragraph 9 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

10. This defendant admits the averments contained in paragraph 10 of the complaint.

11. As to the truth of the averments contained in paragraph 11 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

12. As to the truth of the averments contained in paragraph 12 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

13. This defendant admits the averments contained in the first sub-paragraph and in the first sentence of the second sub-paragraph of paragraph 13 of the complaint.

As to the truth of the other averments contained in the remainder of paragraph 13 of the complaint, this defendant is without knowledge or information sufficient to form a belief, except in this behalf, this defendant avers, on information and belief, that the nature of hardboard is as described, defined, and explained in Section 24 and Schedules I and II of the Del Credere Factor's Agreement between this defendant and Masonite, dated the 29th day of October 1936.

14. This defendant admits that hardboard is a hard, dense, and grainless product resulting from the compression of wood fibers.

As to the truth of the other averments contained in para-
256 graph 14 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

15. As to the truth of the averments contained in paragraph 15 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

16. This defendant admits and avers that defendant Masonite owns patents covering the machinery or processes involved in the production of hardboard, or the product manufactured through the use of such machinery or processes, which are described and referred to in the Del Credere Factor's Agreement between this defendant and Masonite, dated the 29th day of October 1936.

17. This defendant admits that Masonite has marketed products made from wood fiber under such trade names as "Quartrboard," "Presdwood," and "Temprtile." As to the truth of the other averments contained in paragraph 17 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

18. As to the truth of the averments contained in paragraph 18 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

19. This defendant admits and avers that about March 1929, a letter warning came to the attention of this defendant, containing substantially the statements alleged and referred to in paragraph 19 of the complaint. As to the other averments contained in said paragraph 19, this defendant is without knowledge or information sufficient to form a belief.

20. As to the truth of the averments contained in paragraph 20 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

21. As to the truth of the averments contained in paragraph 21 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

22. As to the truth of the averments contained in paragraph 22 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

257 23. As to the truth of the averments contained in paragraph 23 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

24. As to the truth of the averments contained in paragraph 24 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

25. This defendant admits the averments contained in paragraph 25 of the complaint.

26. As to the truth of the averments contained in paragraph 26 of the complaint, this defendant has no knowledge or information sufficient to form a belief, except this defendant admits and avers that it had under consideration the development of a process suitable for the production of a fiberboard having some of the properties or characteristics of hardboard within the description, definition, and explanation referred to in paragraph 13 of this answer.

27. As to the truth of the averments contained in paragraph 27 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

28. As to the truth of the averments contained in paragraph 28 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

29. As to the truth of the averments contained in paragraph 29 of the complaint, this defendant has no knowledge or information sufficient to form a belief, except that this defendant admits and avers that beginning in 1933 it purchased from Insulite a so-called hardboard which it resold under its own brand name.

30. This defendant admits the averments contained in paragraph 30 of the complaint.

31. As to the truth of the averments contained in paragraph 31 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

32. This defendant admits the averments contained in paragraph 32 of the complaint.

258 33. This defendant admits and avers that it was selling a so-called hardboard manufactured by Insulite. As to the truth of the other averments contained in paragraph 33, this defendant is without knowledge or information sufficient to form a belief.

34. As to the truth of the averments contained in paragraph 34 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

35. As to the truth of the averments contained in paragraph 35 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

36. This defendant denies the averments of paragraph 36 of the complaint insofar as they or any of them refer or purport to refer to this defendant. As to the truth of the other averments of said paragraph, this defendant is without knowledge or information sufficient to form a belief.

37. As to the truth of the averments contained in paragraph 37 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

38. This defendant denies that either Masonite or Celotex sought to have this defendant join in any unlawful conspiracy, and further denies that this defendant at any time joined in any unlawful conspiracy, monopoly, or restraint of trade, or became or was a participant therein, as alleged or described in the complaint or otherwise. As to the truth of the other averments of said paragraph, this defendant is without knowledge or information sufficient to form a belief.

39. This defendant denies the averments contained in paragraph 39 of the complaint.

40. This defendant denies the averments contained in paragraph 40 of the complaint.

41. As to the truth of the averments contained in paragraph 41 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

259 42. This defendant admits that Celotex was producing large quantities of insulation board. As to the truth of the other averments contained in paragraph 42 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

43. This defendant admits that Masonite and the receivers for Celotex entered into certain agreements dated and entitled as in paragraph 43 of the complaint averred. As to the truth of the other averments contained in said paragraph, this defendant is without knowledge or information sufficient to form a belief.

44. As to the truth of the averments contained in paragraph 44 of the complaint, this defendant is without knowledge or information sufficient to form a belief; but in this behalf this defendant refers to the agreement in its entirety, which in truth was entered into between Masonite and the receivers for Celotex, for ascertainment of its contents, meaning and effect.

45. This defendant admits and avers that paragraph 45 of the complaint sets forth certain, but not all, of the terms of the supplemental agreement in said paragraph referred to.

46. As to the truth of the averments contained in paragraph 46 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

47. As to the truth of the averments contained in paragraph 47 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

48. As to the truth of the averments contained in paragraph 48 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

49. This defendant denies the averments contained in paragraph 49 of the complaint.

50. This defendant admits that Masonite and National Gypsum entered into an agreement dated and entitled as in paragraph 50 of the complaint averred. As to the truth of the other averments contained in said paragraph, this defendant is without knowledge or information sufficient to form a belief.

260 51. As to the truth of the averments contained in paragraph 51 of the complaint, this defendant is without knowledge or information sufficient to form a belief; but in this

behalf this defendant refers to the agreement in its entirety for ascertainment of its contents, meaning, and effect.

52. As to the truth of the averments contained in paragraph 52 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

53. This defendant admits that Masonite and Johns-Manville Sales entered into certain agreements dated and entitled as in paragraph 53 of the complaint averred. As to the truth of the other averments contained in said paragraph, this defendant is without knowledge or information sufficient to form a belief.

54. As to the truth of the averments contained in paragraph 54 of the complaint, this defendant is without knowledge or information sufficient to form a belief; but in this behalf this defendant refers to the agreement in its entirety for ascertainment of its contents, meaning and, effect.

55. As to the truth of the averments contained in paragraph 55 of the complaint, this defendant is without knowledge or information sufficient to form a belief; but in this behalf this defendant refers to the supplemental agreement in its entirety for ascertainment of its contents, meaning, and effect.

56. As to the truth of the averments contained in paragraph 56 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

57. This defendant admits that Masonite and Armstrong entered into certain agreements dated and entitled as in paragraph 57 of the complaint averred. As to the truth of the other averments contained in said paragraph 57, this defendant is without knowledge or information sufficient to form a belief.

58. As to the truth of the averments contained in paragraph 58 of the complaint, this defendant is without knowledge or
261 information sufficient to form a belief; but in this behalf this defendant refers to the agreement in its entirety for ascertainment of its contents, meaning, and effect.

59. As to the truth of the averments contained in paragraph 59 of the complaint, this defendant is without knowledge or information sufficient to form a belief; but in this behalf this defendant refers to the supplemental agreement in its entirety for ascertainment of its contents, meaning, and effect.

60. As to the truth of the averments contained in paragraph 60 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

61. This defendant admits that Masonite and Hawaiian Cane Products, Ltd., entered into an agreement dated and entitled as in paragraph 61 of the complaint averred. As to the truth of the other averments contained in said paragraph, this defendant is without knowledge or information sufficient to form a belief.

62. As to the truth of the averments contained in paragraph 62 of the complaint, this defendant is without knowledge or information sufficient to form a belief; but in this behalf this defendant refers to the agreement in its entirety for ascertainment of its contents, meaning, and effect.

63. As to the truth of the averments contained in paragraph 63 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

64. This defendant admits that Masonite and Wood Conversion entered into the two agreements dated and entitled as in paragraph 64 of the complaint averred. This defendant denies that said agreements or either of them were made in pursuance, or as a part, of any conspiracy or any unlawful agreement, combination, understanding, or action. Said agreements were cancelled and terminated and rendered of no further force and effect long before the commencement of this action, to wit, in 1936.

65. This defendant denies the averments of paragraph 65 of the complaint; but in this behalf, for ascertainment of the
262 contents, meaning, and effect of the agreement in its entirety, this defendant hereby incorporates said agreement herein by reference, as fully and to the same effect as if the same were herein set forth verbatim.

66. This defendant denies the averments contained in paragraph 66 of the complaint; but in this behalf, for ascertainment o fthe contents, meaning and effect of the supplemental agreement in its entirety, this defendant hereby incorporates said agreement herein by reference, as fully and to the same effect as if the same were herein set forth verbatim.

67. This defendant denies the averments contained in paragraph 67 of the complaint.

68. This defendant admits the averments contained in the first sentence of paragraph 68 of the complaint. As to the truth of the other averments contained in said paragraph, this defendant is without knowledge or information sufficient to form a belief.

69. This defendant admits that Masonite and Insulite entered into certain agreements dated and entitled as in paragraph 69 of the complaint averred. As to the other averments contained in said paragraph, this defendant is without knowledge or information sufficient to form a belief.

70. At to the truth of the averments contained in paragraph 70 of the complaint, this defendant is without knowledge or information sufficient to form a belief; but in this behalf this defendant refers to said agreements in their entirety for ascertainment of their contents, meaning, and effect.

71. As to the averments contained in paragraph 71 of the complaint, this defendant is without knowledge or information suf-

ficient to form a belief; but in this behalf this defendant refers to the supplemental agreement in its entirety for ascertainment of its contents, meaning, and effect.

72. As to the truth of the averments contained in paragraph 72 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

263 73. This defendant admits that Masonite and Agasote Millboard Company entered into certain agreements dated and entitled as in paragraph 73 of the complaint averred. As to the truth of the other averments contained in said paragraph, this defendant is without knowledge or information sufficient to form a belief.

74. As to the truth of the averments contained in paragraph 74 of the complaint, this defendant is without knowledge or information sufficient to form a belief; but in this behalf this defendant refers to the agreement in the entirety for ascertainment of its contents, meaning, and effect.

75. As to the truth of the averments contained in paragraph 75 of the complaint, this defendant is without knowledge or information sufficient to form a belief; but in this behalf this defendant refers to the supplemental agreement in the entirety for ascertainment of its contents, meaning, and effect.

76. As to the truth of the averments contained in paragraph 76 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

77. This defendant denies that it was induced to enter into any agreement or agreements with Masonite by reason of the alleged representation of Masonite contained in paragraph 77 of the complaint. As to the truth of the other averments of said paragraph, this defendant is without knowledge or information sufficient to form a belief.

78. This defendant admits the averments contained in the first sentence, but denies the averments of the second sentence, of paragraph 78 of the complaint, insofar as they refer or purport to refer to alleged agreements between Masonite and this defendant. As to the truth of the other averments contained in said paragraph this defendant is without knowledge or information sufficient to form a belief.

79. This defendant denies the averments contained in paragraph 79 of the complaint, insofar as they refer or purport to refer to alleged agreements or understandings between Masonite and this defendant. As to the truth of all other averments contained in said paragraph, this defendant is without knowledge or information sufficient to form a belief.

264 80. As to the truth of the averments contained in paragraph 80 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

81. As to the truth of the averments contained in paragraph 81 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

82. This defendant admits that Masonite entered into certain separate new agreements and supplemental agreements with defendants, Celotex, National Gypsum, Johns-Manville Sales, Armstrong, Wood Conversion, Insulite, and Hawaiian Cane Products, Ltd., referred to in paragraph 82 of the complaint; but in this behalf this defendant refers to said agreements and supplemental agreements in their entirety for the contents, meaning, and effect of them, and each of them. This defendant denies all of the other averments contained in said paragraph.

83. This defendant denies the averments contained in paragraph 83 of the complaint, except that as hereinbefore admitted, this defendant admits that it entered into an agreement and supplemental agreement with Masonite, both dated October 29th, 1936; but in this behalf for ascertainment of the contents, meaning, and effect of said agreements, this defendant hereby incorporates the same herein by reference, as fully and to the same effect as if the same were herein set forth verbatim.

84. This defendant denies that it ever made with Masonite any of the understandings or agreements averred in paragraph 84 of the complaint. As to the truth of the other averments of said paragraph, this defendant is without knowledge or information sufficient to form a belief.

85. As to the truth of the averments contained in paragraph 85 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

86. This defendant denies the averments contained in paragraph 86 of the complaint.

87. As to the truth of the averments contained in paragraph 87 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

265 88. As to the truth of the averments contained in paragraph 88 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

89. As to the truth of the averments contained in paragraph 89 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

90. This defendant denies all of the averments contained in paragraph 90 of the complaint, insofar as they or any of them refer or purport to refer to any agreement or understanding entered into or made by this defendant with Masonite. As to the truth of the other averments of said paragraph this defendant is without knowledge or information sufficient to form a belief.

91. This defendant admits and avers that since June 25, 1934, defendant Masonite has manufactured hardboard for distribution and sale by this defendant; has fixed prices, terms and conditions of sale at which this defendant has made sales of said hardboard; has designated certain classifications of customers to whom this defendant can make sales of said hardboard, and has excluded this defendant from sale of said hardboard for industrial uses generally; and has granted to this defendant commissions, allowances, or discounts within a range from 35% to 52% of the price to dealers; and has done each and every of said things pursuant to the terms and conditions of the agreements between Masonite and this defendant hereinbefore referred to in paragraphs 64 and 82 of this answer. As to the truth of the other allegations of said paragraph, insofar as they refer or purport to refer to relationships between defendants other than this defendant and Masonite, this defendant is without knowledge or information sufficient to form a belief.

92. As to the truth of the averments contained in paragraph 92 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

93. As to the truth of the averments contained in paragraph 93 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

94. This defendant denies the averments contained in paragraph 94 of the complaint.

266 95. As to the truth of the averments contained in paragraph 95 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

96. As to the truth of the averments contained in paragraph 96 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

97. As to the truth of the averments contained in paragraph 97 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

98. As to the truth of the averments contained in paragraph 98 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

99. As to the truth of the averments contained in paragraph 99 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

100 This defendant denies the averments contained in paragraph 100 of the complaint.

101. This defendant denies the averments contained in paragraph 101 of the complaint, insofar as they or any of them refer or purport to refer to this defendant. As to the truth of the

other averments of said paragraph, this defendant is without knowledge or information sufficient to form a belief.

102. This defendant is without knowledge or information sufficient to form a belief as to the truth of any averment or averments contained in paragraph 102 of the complaint that any commissions, discounts or allowances paid by Masonite to a defendant or defendants, other than this defendant, have been or are responsible for any profits, substantial or otherwise, made by a defendant or defendants other than this defendant. This defendant denies all other averments contained in said paragraph.

103. As to the truth of the averments contained in paragraph 103 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

267 104. As to the truth of the averments contained in paragraph 104 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

105. This defendant denies the averments contained in paragraph 105 of the complaint.

106. This defendant denies the averments contained in paragraph 106 of the complaint; but in this behalf this defendant refers to the agreements, and each of them, in their entirety for ascertainment of the contents, meaning and effect of them, and each of them.

107. As to the truth of the averments contained in paragraph 107 of the complaint, this defendant is without knowledge or information sufficient to form a belief.

108. This defendant denies the averments contained in paragraph 108 of the complaint.

109. This defendant denies the averments contained in paragraph 109 of the complaint.

110. This defendant denies each and every allegation of the complaint not hereinbefore denied, admitted, or explained.

Wherefore, this defendant prays that this suit be dismissed as to it.

LAWRENCE C. HULL, JR.,
25 Broad St., New York City, N. Y.,
Attorney for Defendant Wood Conversion Company.

CHAS. W. BRIGGS,
(of the firm of Clapp, Briggs, Gilbert & McCartney)
W-2162 First Natl. Bank Bldg.,
St. Paul, Minnesota,
Of Counsel.

268 [*Duly sworn to by E. W. Davis; jurat omitted in printing.*]

269 In District Court of the United States for the Southern District of New York

[Title Omitted.]

Answer of the Insulite Company

Filed April 27, 1940

Now comes The Insulite Company, a corporation, hereinafter sometimes referred to as "defendant" or "this defendant," and for its answer to the complaint of the plaintiff herein admits, denies and alleges as hereinafter set forth.

1. Defendant admits that the complaint herein was filed and the proceedings instituted under Section 4 of the Sherman Anti-trust Act and under Section 15 of the Clayton Act against the above-named defendants in order to prevent alleged violations of Sections 1 and 2 of said Sherman Act and Section 3 of said Clayton Act. Defendant denies any violation upon its part, either severally or jointly with all or any of the other defendants herein, of said Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act or of either of them.

2. Defendant admits that interstate trade and commerce in hardboard are carried on in part within the Southern District of New York and that certain of the defendants herein conduct their
270 business and are found within the said district, but defendant denies each and every other averment contained in Paragraph 2 of said complaint.

3. Defendant admits that Masonite Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal office at Chicago, Illinois, and its manufacturing plant at Laurel, Mississippi, but this defendant is without knowledge or information sufficient to form a belief as to the truth of the other averments contained in Paragraph 3 of said complaint.

4. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraphs 4, 5, 6, 8, 9, 11, and 12 of said complaint.

5. Defendant admits that it is a corporation organized and existing under the laws of the State of Minnesota, with its principal office located at Minneapolis, Minnesota. Defendant corporation was initially organized for the purpose of, and is primarily engaged in, manufacturing and distributing fiber insulation board produced from waste products (resulting from paper-making operations) and other material. Defendant is a substantial producer of insulation board and in recent years has distributed other kinds of building materials. Otherwise than as admitted or alleged in

this paragraph, defendant denies the averments contained in Paragraph 7 of said complaint.

6. Defendant admits the averments contained in Paragraph 10 of said complaint.

7. Defendant admits that the description of "hardboard" contained in the first and second paragraphs of Paragraph 13 is substantially correct, and that hardboard is used for the purposes, among others, set forth in said Paragraph 13. Defendant alleges, upon information and belief, that the name "hardboard" is
271 generally used in the building trade to describe "quarterboard" as well as hardboard products of greater density. Except as herein admitted and alleged, defendant denies each and every averment contained in said Paragraph 13 of said complaint.

8. Defendant admits, upon information and belief, that the hardboard products manufactured by Masonite Corporation are commonly made substantially as described in Paragraph 14 of said complaint.

9. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 15 of said complaint.

10. Defendant admits the averments contained in Paragraph 16 of said complaint.

11. Defendant admits the averments contained in Paragraph 17 of said complaint.

12. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraphs 18, 19, 20, 21, 22, 23, and 24 of said complaint.

13. Defendant admits the averments contained in Paragraph 25 of said complaint.

14. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraphs 26, 27, and 28 of said complaint.

15. Defendant alleges that during the year 1930 defendant commenced the production of hardboard products and marketed such products under defendant's trade name to the building trade and to industrial buyers, and in the year 1933 and thereafter sold hardboard products manufactured by it to the defendant Wood Conversion for resale under Wood Conversion's own brand
272 name. Otherwise than as alleged in this paragraph, defendant denies the averments contained in Paragraph 29 of said complaint.

16. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraphs 30, 31, and 32 of said complaint.

17. Defendant admits that at the time referred to in Paragraph 33 of said complaint, defendant was manufacturing and selling hardboard products and that Wood Conversion was selling hardboard products manufactured by this defendant, but otherwise than as herein admitted, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 33 of said complaint.

18. Defendant admits that at the time referred to in Paragraph 34 of said complaint, defendant had an established selling organization with facilities for a wide distribution of the products marketed by it. Otherwise than as herein admitted, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 34 of said complaint.

19. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 35 of said complaint.

20. Defendant denies each and every averment contained in Paragraph 36 of said complaint.

21. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 37 of said complaint.

22. Defendant denies each and every averment contained in Paragraphs 38, 39, 40 of said complaint.

273 23. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraphs 41, 42, 43, 44, 45, 46, 47, 48, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, and 67 of said complaint.

24. Defendant denies each and every averment contained in Paragraph 49 of said complaint.

25. Defendant admits the averments contained in Paragraph 68 of said complaint. Defendant alleges further that it is a wholly owned subsidiary company of Minnesota and Ontario Power Company, a Maine corporation with its principal office in Minneapolis, Minnesota, and that from February 28, 1931, until the appointment in July 1934 of Trustees under Section 77B of the Bankruptcy Act of the United States, said parent company, Minnesota and Ontario Paper Company, was operated by equity receivers appointed by the United States District Court, District of Minnesota, Fourth Division; that on March 22, 1934, said equity receivers of Minnesota and Ontario Paper Company petitioned said United States District Court for authority to cause its subsidiary company, this defendant, to defend against the suit brought by Masonite against Faxon Lumber Company and that by order dated March 31, 1934, and signed by Judge Joseph

W. Molyneaux of said United States District Court, said equity receivers were authorized to cause this defendant to defend the said suit on behalf of this defendant and of said Faxon Lumber Company, and pursuant to said authorization, this defendant did enter upon the defense of said suit.

26. Defendant denies each and every averment contained in Paragraph 69 of said complaint, but admits that on February 2 and February 8, 1935, it entered into three agreements with Masonite entitled "Agency Agreement and License Option" and "Supplemental Agreement" respectively. Defendant al-
274 leges that these three agreements were wholly terminated in October 1936. Defendant further alleges that in July 1934 the United States District Court, District of Minnesota, Fourth Division, appointed Trustees of Minnesota and Ontario Paper Company under Section 77B of the Bankruptcy Act of the United States and that the appointment of said Trustees was made permanent by order of said court dated September 29, 1934, and that since said date, the parent company of this defendant has continued under said Section 77B; that by petition dated February 1, 1935, Messrs. C. T. Jaffray, R. H. M. Robinson. and S. M. Archer, as the duly appointed and acting Trustees of said Minnesota and Ontario Paper Company, petitioned said United States District Court for authority to cause this defendant to execute the three agreements with Masonite referred to in Paragraph 69 of said complaint and to enter into a dismissal of the suit against Faxon Lumber Company referred to in Paragraph 68 of said complaint and by order dated February 2, 1935, and signed by Judge Joseph W. Molyneaux of said United States District Court, said Trustees of the parent company were authorized to cause this defendant to enter into said agreements with Masonite and pursuant to said authorization, this defendant did enter into said three agreements.

27. Defendant denies that the true contents and legal effect of the agency agreement are as stated in Paragraph 70 of said complaint, and for greater certainty with reference to the meaning, terms, and effect thereof, defendant refers to the original agreement with the same force and effect as if it were set forth herein and made a part hereof.

28. Defendant denies that the true contents and legal effect of the supplemental agreement are as stated in Paragraph 71 of said complaint, and for greater certainty with reference
275 to the meaning, terms, and effect thereof, defendant refers to the original agreement with the same force and effect as if it were set forth herein and made a part hereof.

29. Defendant denies each and every averment contained in Paragraph 72 of said complaint.

30. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraphs 73, 74, 75, and 76 of said complaint.

31. Defendant denies each and every averment contained in Paragraph 77 of said complaint as to this defendant. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 77 as to defendants other than this defendant.

32. Defendant denies each and every averment contained in Paragraphs 78 and 79 of said complaint.

33. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraphs 80 and 81 of said complaint.

34. Defendant admits that on October 29, 1936, written agreements were entered into between Masonite and Insulite and that the prior agreements between Masonite and Insulite referred to in Paragraph 69 of said complaint were terminated, but defendant specifically denies that said new agreements between Masonite and Insulite were in furtherance of any unlawful conspiracy or made pursuant thereto. Otherwise than as herein admitted or denied, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 82 of said complaint.

276 35. Defendant denies that the true contents and legal effect of the agreements are as stated in Paragraph 83 of said complaint and for greater certainty defendant refers to the original agreements with the same force and effect as if set forth herein and made a part hereof.

36. Defendant denies each and every averment contained in Paragraph 84 of said complaint bearing upon any alleged understanding or agreement between Masonite and Insulite and alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in said paragraph with respect to Masonite and the defendants herein other than this defendant.

37. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 85 of said complaint.

38. Defendant denies each and every averment contained in Paragraph 86 of said complaint.

39. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraphs 87, 88, and 89 of said complaint, except that defendant admits the allegation in Paragraph 87 that prior to March 16, 1937, Flintkote, as selling agent of this defendant, had been distributing hardboard manufactured by Masonite.

40. Defendant alleges that it has duly observed the terms and provisions of its said agreements with Masonite of February 2 and February 8, 1935 (so long as said agreements were in force and effect), and of October 29, 1936, but specifically denies that in such observance it has been a party to any conspiracy, agreement, or understanding in restraint of trade or commerce. Other-
277 wise than as alleged or denied herein, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 90 of said complaint.

41. Defendant admits that while said agreements between Masonite and this defendant have been in effect, this defendant as a del credere factor of Masonite has distributed and sold hardboard manufactured by Masonite; that under said agreements, Masonite fixed prices, terms, and conditions of sale to be observed by this defendant as factor, designated the classification of customers to whom this defendant as factor might make sales and reserved to Masonite the exclusive right to make certain sales; and that Masonite allowed to this defendant commissions ranging from 35% to 52% of the car lot list price to dealers. Otherwise than as herein admitted, defendant denies each and every averment in paragraph 91 of said complaint as to this defendant and alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in said paragraph 91 of said complaint as to the other defendants herein.

42. Defendant admits that it has manufactured Insulite hardboard for export purposes, but otherwise defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 92 of said complaint.

43. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 93, 95, 96, 97, 98, and 99 of said complaint.

44. Defendant denies each and every averment contained in paragraphs 94, 100, 101, and 102 of said complaint.

278 45. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 103 and 104 of said complaint.

46. Defendant denies each and every averment contained in paragraph 105 of said complaint.

47. Defendant denies that paragraph 106 of said complaint correctly states the true contents and legal effect of the del credere factor agreements, and for greater certainty defendant refers to the original agreements with the same force and effect as if set forth herein and made a part hereof.

48. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 107 of said complaint.

49. Defendant denies each and every averment contained in paragraphs 108 and 109 of said complaint.

Further, defendant denies each and every averment in said complaint contained, not hereinbefore admitted, controverted, explained or specifically denied.

Wherefore, defendant prays that the complaint be dismissed as against it.

MILBANK, TWEED & HOPE,
15 Broad Street, New York, N.Y.
Attorneys for Defendant, The Insulite Company.
By TIMOTHY N. PFEIFFER,
A partner of said firm.

FAEGRE, BENSON & KRAUSE,
1260 Northwestern Bank Building, Minneapolis, Minnesota,
Attorneys for Defendant, The Insulate Company.
By J. B. FAEGRE,
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TIMOTHY N. PFEIFFER,
15 Broad Street, New York, N. Y.
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REX H. KITTS,
1260 Northwestern Bank Building,
Minneapolis, Minnesota,
Of Counsel.

279 [*Duly sworn to by R. D. Main; jurat omitted in printing.*]
Copy received 4/27/40.

SAMUEL S. ISSEKS,
Special Assistant to the Attorney General.

281 In United States District Court for the Southern District of New York

[Title omitted.]

Supplemental pleading for the United States in the nature of a reply to the supplemental answer of defendant Masonite Corporation

As a reply to the supplemental answer of the defendant Masonite Corporation herein, the United States of America, on information and belief, says:

1. In reply to paragraph 1 of the said supplemental answer—

(a) the plaintiff admits that an agreement was executed by and between Masonite Corporation and the other defendants herein

on or about April 1, 1941, and dated as of March 20, 1941, but denies that the said agreement was made by Masonite separately with each of the other defendants and alleges that the said agreement was made jointly by Masonite Corporation with all of the other defendants pursuant to, in execution of, and for the purpose of carrying out and continuing the combination and conspiracy which is described in the bill of complaint;

(b) the plaintiff denies that the said agreement supersedes and replaces as of March 20, 1941, all preexisting agreements
282 between defendants relating to the manufacture, distribution, and sale of hardboard;

(c) the plaintiff states that it has no knowledge or information sufficient to form a belief as to the other allegations of paragraph 1 of the said supplemental answer.

2. Replying to paragraph 2 of the said supplemental answer, the plaintiff states that it has no knowledge or information sufficient to form a belief as to the allegations of the said paragraph with respect to the intention of the said defendants in making the new agreement, and alleges that the making of the new agreement by the said defendants is an admission by defendants that the previous agreement between them relating to the sale and distribution of hardboard was in truth and fact not a genuine agency agreement but a contract for purchase and sale and that the provisions of the said agreement were in violation of the antitrust laws.

3. Replying to paragraphs 3 and 4 of the said supplemental answer the plaintiff

(a) admits that counsel for Masonite on March 26, 1941, presented to representatives of the Department of Justice copies of an agreement which counsel for Masonite Corporation stated Masonite Corporation proposed to make with the other defendants, and asked for an expression of the views of the Department of Justice as to the legality or propriety of the proposed agreement;

283 (b) alleges that after an examination of the proposed agreement, representatives of the Department of Justice informed counsel for defendant Masonite Corporation that it was not the policy of the Department of Justice to express any view or opinion concerning the propriety or legality of arrangements which might be made while litigation was pending between the United States and parties to the proposed arrangements; that the defendants should themselves decide, in the exercise of their independent judgment, whether they wished to execute the proposed agreement; that if they determined to do so they must do so on their own responsibility; and that an examination of the proposed agreement had led the Department of Justice to the con-

clusion that if executed it would not provide a basis for the discontinuance of the present suit.

4. In reply to the allegations of paragraph 6 of the said supplemental answer,

(a) the plaintiff denies each and every allegation of the paragraph except that it admits that there are, and have been, divergent opinions as to the proper construction, interpretation, and application of the statutes of the United States and particularly of the antitrust laws, and

(b) alleges that the said new agreement referred to in the said supplemental answer was entered into by defendants pursuant to, in furtherance of, and for the purpose of carrying out and continuing the combination and conspiracy which is alleged in the bill of complaint, and

(c) alleges that the purpose and effect of the said agreement is

(1) to fix, control, establish, and maintain collusive and non-competitive prices and terms and conditions of sale for the
284 distribution, sale, and resale of hardboard in interstate commerce;

(2) to eliminate competition between Masonite and the other defendants with respect to the manufacture, distribution, and sale of hardboard in interstate commerce;

(3) to establish and maintain a collusive method of classifying and selecting customers for hardboard;

(4) to give Masonite Corporation a monopoly of the manufacture of hardboard;

(5) to give Masonite Corporation and the other defendants a monopoly of the distribution and sale of hardboard in interstate commerce;

(6) to prevent the other defendants from engaging in the manufacture or distribution of any products directly and completely competitive with hardboard.

5. Answering the allegations of paragraph 8 of the said supplemental answer, the plaintiff states that it now has no knowledge or information sufficient to form a belief as to the intent of defendants with respect to the execution of the new agreement, and alleges that the new agreement is in substance a continuation of the pre-existing illegal agreement between Masonite and the other defendants herein.

Wherefore, Plaintiff prays:

(1) that it be granted all of the relief prayed for in the bill of complaint, and

(2) that in addition to the relief prayed for in the bill of complaint the Court adjudge that the agreement between Masonite Corporation and the other defendants herein dated as of March

20, 1941, is an illegal combination and conspiracy to restrain
285 and to monopolize trade and commerce in hardboard, and perpetually enjoin the defendants from observing or carrying out the said agreement in any respect and from executing any similar agreement.

(S) HUGH B. COX,
Hugh B. Cox,
Special Assistant to the Attorney General.

(S) MARCUS A. HOLLABAUGH,
Marcus A. Hollabaugh,

(S) ROBERT C. BARNARD,
Robert C. Barnard,
Special Attorneys.

(S) THURMAN ARNOLD,
Thurman Arnold,
Assistant Attorney General.

APRIL 19, 1941.

286 In United States District Court for the Southern District of New York

[Title omitted.]

Stipulation concerning effect of plaintiff's reply

The defendants herein having filed separate supplemental answers and the plaintiff having filed a reply to the supplemental answer filed by the defendant Masonite Corporation, it is hereby stipulated and agreed that the failure of the plaintiff to file a separate reply to each of the supplemental answers filed by each of the other defendants shall not be deemed to be an admission of any of the allegations contained in any of the supplemental answers filed by the other defendants. The defendants Insulite Company, Wood Conversion Company, and Dant & Russell, Inc., have respectively adopted as the supplemental answer of each of the aforesaid defendants the supplemental answer of the defendant Masonite Corporation.

April 20, 1941.

Thurman Arnold, Assistant Attorney General; Hugh B. Cox, Special Assistant to the Attorney General; Marcus A. Hollabaugh, Robert C. Barnard, Special Attorneys; Fletcher Lewis, Louis Quarles, Breed, Abbott & Morgan, Attorneys for Defendant Masonite Corpora-
287 tion; Cravath de Gersdorff, Swaine & Wood, by Thomas A. Halleran, a member of said firm; Andrew J. Dahlstream, Attorneys for Defendant Celotex Corporation;

Hughes, Richards, Hubbard & Ewing, by Oscar R. Ewing, Attorney for Defendant Certain-teed Corporation; Davis Polk Wardwell Gardiner & Reed, Attorneys for Defendant Johns-Manville Sales Corporation; Milbank Tweed & Hope, by Grenville S. Sewall, Attorney for Defendant Insulite Company; Sullivan & Cromwell, by Inzer B. Wyatt, Attorney for Defendant Flintkote Company; Henry K. Urion, Elmer E. Finck, Attorneys for Defendant National Gypsum Company; Chas. W. Briggs, Attorney for Defendant Wood Conversion Company; Le Boeuf, MacHold & Lamb, Attorneys for Defendant Armstrong Cork Company; *Lawrence C. Hull, Jr.*, Attorney for Defendant Dant & Russell, Inc.

287-A In District Court of the United States For the Southern District of New York

[Title omitted.]

Stipulation of facts

Filed May 5, 1941

288 SYNOPSIS OF STIPULATION OF FACTS

Paragraph

1. Common law proof waived.
2. Copies in place of originals.
3. Parties may submit documents believed to be subject of dispute.
4. No implication of motive, etc.
5. Each defendant entitled to exceptions of any defendant.
6. Masonite's organization.
7. Masonite's patents.
8. Celotex' organization—owns 23% of Certain-teed.
9. Certain-teed's organization.
10. Johns-Manville's organization.
11. Insulite's organization.
12. Flintkote's organization.
13. National Gypsum's organization.
14. Wood Conversion's organization.
15. Armstrong's organization.
16. Dant & Russell's organization.
17. Hardboard shipped in interstate commerce and into New York.
18. Description of process of making hardboard and definition thereof.

Paragraph

19. Uses of hardboard and materials for which it can be substituted.
20. List of Masonite's patents and applications owned by Masonite in 1926.
21. Masonite's trademarks.
22. Organization of Celotex Company and its commencing to manufacture new hard panel board in 1928.
23. Letter of October 8, 1928, from Dyke to Celotex.
24. Meeting between Masonite and Celotex patent representatives, May 22, 1929.
25. Suggestions of Masonite and Celotex—patent inspections.
26. Celotex invested $100,000 in machinery; commenced to manufacture hard panel board in 1929.
27. February 1929—Celotex news.
28. Masonite's circular warning letter in March 1929.
289 29. Conferences regarding cross-licenses between Masonite and Celotex.
30. Infringement notice—Masonite to Celotex, May 6, 1930.
31. Receivers appointed for Celotex in 1929. April 2, 1931—Masonite sued Celotex for infringement; Receivers defended; history of the litigation; the Court approved the "Agency Agreement and License Option."
32. After patent litigation, Masonite in financial difficulties; nature of the building industry; Masonite secures poolcar tariff revisions.
33. Masonite and Celotex receivers execute the "Agency Agreement and License Option" in 1933.
34. The receivership in bankruptcy of Celotex closed and Celotex Corporation assumed Masonite contracts with approval of the Court.
35. 1930—Insulite commences production of hard panel board under patents as listed.
36. March 3, 1934—Masonite sues The Faxon Lumber Company, Insulite's dealer, for infringement; Insulite assumes the defense subject to the approval of the Court.
37. July 1934—Federal Court approves the "Agency Agreement and License Option" between Insulite and Masonite.
38. "Agency Agreements and License Options" made with remaining seven defendants.
39. List of the "agency" and supplemental agreements.
40. Agasote agreement terminated.
41. October 29, 1936—new "Agency Agreements and License Options" substituted for the old.
42. Copies of the Del Credere and Supplemental Agreements.

Paragraph

43. Hawaiian Cane assigned to Certain-teed its rights except those pertaining to the Hawaiian Islands.
44. Masonite "Agency Agreement" with Flintkote in March 1937.
45. June 1937—Masonite agreement with Dant & Russell.
46. Various patent interferences between Masonite and Insulite settled by supplemental agreements.
47. The defendants other than Masonite are national distributors; their functions explained.

290 48. Masonite never exercised option under Section 7 of the Del Credere Agreements of 1936.

49. Provisions relating to shorts were eliminated on August 26, 1940.
50. New "Agency Agreements" entered into as of March 20, 1941.
51. Masonite made new agreement with Hawaiian Cane as of March 31, 1941.
52. Some defendants used own trade names and some not.
53. Masonite issued price lists to dealers.
54. Defendants other than Masonite directed to sell at prices in Masonite's dealer price list.
55. Masonite made sales to wholesalers at discounts shown on its price lists.
56. Table of Masonite's hardboard sales segregated as to export, industry, etc.
57. Table of annual sales of Insulite's hardboard.
58. May, 1934 agreement between United States Gypsum Co. and Masonite re light-colored insulation board.
59. From 1934 to 1937 United States Gypsum Co. bought "Quartrboard" from Masonite at prices stated.
60. In 1934 United States Gypsum Co. started producing hard panel board; interference proceedings terminated in 1937; United States Gypsum Co. claimed to have changed its process of manufacture.
61. United States Gypsum Co. sold its own hard panel board and hardboard to Masonite in interstate commerce and also issued dealer price lists.
62. United States Gypsum Co. issued wholesaler price lists.
63. United States Gypsum Co.'s sales about 2% to 3% of Masonite's sales.
64. Masonite and Insulite only authorized hardboard manufacturers; Masonite suing United States Gypsum Co. for infringement.
65. Masonite's Annual Reports submitted.
66. Details about Masonite's employment, wage scale, salaries, etc.

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295 In District Court of the United States for the Southern District of New York

[Title omitted.]

Stipulation

The plaintiff having filed its complaint herein and defendants having filed their answers, the parties hereto hereby stipulate and agree to the following matters and statement of facts together with the exhibits submitted herewith and made a part hereof. The said stipulation and agreement is made solely for the purpose of this trial and all parts of the said statement of facts shall be subject to objections by either side on the ground of relevancy or materiality. Nothing in this stipulation shall preclude either the plaintiff or the defendants from introducing

additional or elaborative relevant and material testimony, written or oral.

1. For the purpose of this trial, and for no other purpose, the parties will not require common law proof of patents, trademarks, court records (including printed copies of records on appeal), corporate minute books, financial statements, books of account, invoices, or other records forming a part of the regularly kept records of any of the parties hereto, or any
296 correspondence or documents (or the signatures thereto) relevant to any of the issues herein, where the existence or authenticity of such matters or documents or of the signatures thereto is not an issue or the subject of denial or dispute; but this stipulation shall in no wise affect or prejudice the right of any of the parties hereto to challenge the relevancy or materiality of such document as regards the party so challenging or any other party, or the right of any of the parties to claim that such document is privileged or has no probative effect against or is not binding upon it; and nothing in this stipulation shall be deemed a waiver of privilege or an admission or concession as to the probative effect or as to the meaning or intent of any such document.

2. Subject to correction when and if errors may appear, uncertified copies or photostatic copies of documents may be offered in evidence with the same force and effect as the originals thereof.

3. In order to facilitate the carrying out of this stipulation and its purpose, the plaintiff may submit to the defendants, or any defendant may submit to the plaintiff and the other defendants, at any time before or during the trial, a list of such documents as such party believes to be the subject of any dispute as to existence or authenticity, in order thereby to afford all the parties a fair opportunity to determine whether there is any such challenge or dispute as to such document or signature. If any party decides that there is such challenge or dispute, it shall thereupon be the duty of such party promptly so to inform the party submitting such list and to state to such party whether or not and to what extent common law proof will be required.

4. Nothing in this stipulation shall be deemed to carry or convey the implication of an admission or concession concern-
297 ing any characterizations, inferences, or conclusions which may appear in any of the pleadings relative to the contents, effect, motive, or purpose of any of the documents as to which, pursuant to this stipulation, common law proof may not be required.

5. Subject to the approval of the Court, at the trial of this action any objection or exception taken by any of the parties defendant shall be deemed to be taken by and to inure to the

benefit of all the defendants unless the contrary is expressly stated on the minutes of the trial.

6. The defendant Masonite Corporation (sometimes hereinafter referred to as Masonite) is a corporation organized and existing under the laws of the State of Delaware, with its principal business office at Chicago, Illinois, and its manufacturing plant at Laurel, Mississippi. Said defendant was organized in 1925 by William H. Mason and others under the name of Mason Fiber Company, and in 1928 the corporate name thereof was changed to Masonite Corporation. Masonite claims to be the originator of the hardboard products which it manufactures and of the apparatus and processes which it uses in their manufacture, and holds patents covering such products and processes and apparatus used by it in their manufacture. Since 1926 to the present time, Masonite has been the largest manufacturer of hardboard in the world. Throughout said period Masonite (apart from supplying hardboard for sale through the other defendants herein) has itself been the largest seller and distributor of hardboard in the world. From 1926 to the present time Masonite has shipped or distributed in interstate commerce substantially all the hardboard which it has produced. Masonite, throughout said period, has manufactured and sold, in addition to its hardboard, brown- or dark-colored fiber structural in-
298 sulation board which is a rigid fiber board. Substantially the entire business conducted by Masonite since its organization has been the manufacture and distribution of hardboard and fiber insulation board products. Masonite has never supplied any of its fiber insulation board products to the other defendants herein. Masonite has supplemented its line of insulation board by purchasing light colored structural insulation board from the following companies during the following periods: From United States Gypsum Company during the years 1934, 1935, 1936, and 1937; from the Insulite Company during the years 1935, 1936, 1937, and 1938; from Hawaiian Cane Products, Ltd., from 1937 to date; and from Flintkote from March 1, 1941 to date. Fiber structural insulation board is a softer and lighter board than hardboard, has less tensile strength, is less resistant to water, and is especially used as an insulator against heat, cold, and sound.

7. Defendant Masonite is the owner of a number of United States Letters Patent relating to hardboard and to the machinery and processes for the production thereof. A true and correct copy of each of the said patents owned by Masonite, together with a list thereof showing the number, issue date, inventor and title, has been bound in a book and submitted herewith as "Exhibit S-1," and made a part hereof. Said patents are 50 in

number; 41 of them were issued on applications of William H. Mason; 1 was issued on joint application of William H. Mason and Charles H. Westphalen; of the remaining patents only 4 were issued on applications made by applicants not in the employ of Masonite.

8. The defendant, The Celotex Corporation, is a corporation organized and existing under the laws of the State of Delaware, with its principal business office at Chicago, Illinois, owning and operating, among others, a large manufacturing plant at Marrero, Louisiana. The Celotex Corporation was organized on
299 June 29, 1935. It is a large producer and distributor of fiber structural insulation board and certain other building materials. Under its agreement with Masonite it distributes throughout the United States hardboard products manufactured by Masonite. More Masonite hardboard is distributed through the sales force of The Celotex Corporation than through any other outlet except Masonite's own personal selling force. Defendant, The Celotex Corporation, is the present owner of 23.6% of the common stock of defendant Certain-teed Products Corporation, hereinafter described. A list of the principal materials manufactured or distributed as principal, agent or otherwise by The Celotex Corporation is attached, marked "Exhibit S-2," and made a part hereof.

9. The defendant Certain-teed Products Corporation (hereinafter sometimes referred to as Certain-teed) is a corporation organized in 1917 and existing under the laws of the State of Maryland, with its principal business office at New York, New York. A list of the principal materials, manufactured or distributed by Certain-teed, marked "Exhibit S-3," is attached hereto and made a part hereof. Certain-teed is not and never has been a manufacturer of fiber structural insulation board, and has been a distributor thereof only since 1932, since which date it has distributed structural insulation manufactured in the plant of Hawaiian Cane Products, Ltd., and the plant of Celotex to the extent that Hawaiian Cane products are not at the time available.

10. The defendant Johns-Manville Sales Corporation (sometimes hereinafter referred to as Johns-Manville Sales) is a corporation organized in 1929 and existing under the laws of the State of Delaware, with its principal business office located at New York, New York. Johns-Manville Sales Corporation is a wholly owned subsidiary of Johns-Manville Corporation which both di-
300 rectly and through subsidiaries is a large manufacturer of roofing, insulation, and allied building materials and other commodities not connected with the building trade. Johns-Manville Sales sells the products manufactured by Johns-Manville Corporation and its subsidiaries, and also sells building materials

and a large number of other commodities manufactured by non-affiliated companies. A list of the principal materials distributed by Johns-Manville Sales, marked "Exhibit S-4," is attached hereto and made a part hereof. Johns-Manville Corporation has manufactured fiber structural insulation board since about December 1934. Johns-Manville Sales or its predecessors has sold fiber structural insulation board since about January 1929.

11. The defendant Insulite Company (sometimes hereinafter referred to as Insulite) is a corporation organized and existing under the laws of the State of Minnesota, with its principal business office located at Minneapolis, Minnesota. It was initially organized for the primary purpose of producing and distributing fiber structural insulation board produced from waste products (resulting from paper-making operations) and other materials. Since about 1925 Insulite has been a large producer and distributor of fiber structural insulation board, and since about 1935 it has at times also distributed other kinds of building materials. A list of the principal materials, manufactured or distributed by Insulite in the United States, marked "Exhibit S-5," is attached hereto and made a part hereof. Between 1930 and 1935 Insulite produced substantial amounts of an artificial hard board which it sold in interstate commerce in the United States and exported to foreign countries for sale therein. Since 1935 it has manufactured substantial amounts of hardboard for export to and sale in foreign countries under export agreement with Masonite, as hereinafter set forth.

301 12. The defendant The Flintkote Company (sometimes hereinafter referred to as Flintkote) is a corporation organized and existing under the laws of the State of Massachusetts, with its principal business office at New York, New York. Since about 1888 Flintkote (and its predecessors and subsidiaries) has produced and distributed roofing materials and other materials not connected with the building trade, and since about 1930 it has also engaged in the distribution of other types of building materials. A list of the principal materials, manufactured or distributed by Flintkote, marked "Exhibit S-6," is attached hereto and made a part hereof. Flintkote began the distribution of fiber structural insulation board in 1935 and began manufacturing its own fiber structural insulation board in the year 1941.

13. The defendant National Gypsum Company, sometimes hereinafter referred to as National Gypsum) is a corporation organized in 1925 and existing under the laws of the State of Delaware, with its principal business office located at Buffalo, New York. It is one of the largest producers of gypsum products. Since its organization it has also been a manufacturer and

distributor of other kinds of materials, including building materials. A list of the gypsum products and principal materials manufactured or distributed by National Gypsum, marked "Exhibit S–7," is attached hereto and made a part hereof. National Gypsum began the manufacture and sale of fiber structural insulation board about April 1930.

14. The defendant Wood Conversion Company (sometimes referred to as Wood Conversion) is a corporation organized and existing under the laws of the State of Delaware, with its principal business office at Cloquet, Minnesota. A list of the principal materials, manufactured or distributed by Wood Conversion, marked "Exhibit S–8," is attached hereto and
302 made a part hereof. Wood Conversion Company began the manufacture and sale of fiber structural insulation board about 1927.

15. The defendant Armstrong Cork Company is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal office located at Manheim Township, Lancaster County, Pennsylvania. Armstrong Cork Company since about 1860 has been a large manufacturer of flooring materials, glass, and closure materials, building materials, and other commodities not connected with the building trade. Defendant Armstrong Cork Company has manufactured fiber board insulation and similar products since about August 1938, when it acquired certain of the assets of Armstrong-Newport Company, which had been engaged in such manufacture and distribution. Defendant Armstrong Cork Company and Armstrong-Newport Company are sometimes hereinafter referred to as Armstrong. A list of the principal materials manufactured or distributed by Armstrong marked "Exhibit S–9" is attached hereto and made a part hereof.

16. The defendant Dant & Russell, Inc. (sometimes hereinafter referred to as Dant & Russell (is a corporation organized and existing under the laws of the State of Oregon, with its principal business office located at Portland, Oregon. Dant & Russell, Inc. is the exclusive distributor of fiber structural insulation board manufactured by Fir-Tex Insulation Board Company, an Oregon corporation, and it has been engaged since August 1, 1930 in the wholesale distribution of fiber structural insulation board and allied building materials. A list of the principal materials, distributed by Dant & Russell, marked "Exhibit S–10," is attached hereto and made a part hereof.

17. Hardboard manufactured by Masonite is shipped from the factory of Masonite in the State of Mississippi into
303 other states and territories of the United States, where it is received by the defendants Celotex, Certainteed, Johns-

Manville Sales, Insulite, Flintkote, National Gypsum, Wood Conversion, Armstrong, and Dant & Russell, under the written agreements, as hereinafter more particularly stated, and hardboard is also shipped by Masonite from its said factory in Mississippi directly to customers located in other states and territories of the United States whose orders are solicited by the various defendants including Masonite. Substantial amounts of the hardboard so shipped to each of the said defendants are thereafter distributed in interstate commerce by the said defendants and shipped from the state in which the said hardboard has been received by the said defendants to customers located in other states. In each of the years, 1935 to 1940, the defendants have sold and shipped in interstate commerce into the Southern District of New York in excess of 5,000,000 square feet of hardboard. Masonite, Celotex, and certain of the other defendants send into or maintain in the Southern District of New York representatives who solicit orders within the said District for hardboard.

18. Hardboard, the subject-matter of this suit, was patented by the late William H. Mason on March 20, 1928, and is a homogeneous, hard, dense, grainless fiber board product made from wood or woody material and containing substantially all of the original constituents of the wood or woody material. In the manufacture of hardboard by Masonite wood chips are disintegrated into fiber by subjecting them to high pressure steam in "guns" and discharging the gun contents explosively through restricted openings having the form of narrow slots. The resulting fiber is mixed with water, refined, screened, and formed into a felted sheet called a "wetlap," which is freed of either part or substantially all of its water and then pressed in an hydraulic press between heated platens. The resultant products are the homogeneous, hard, dense, grainless, fiber hardboard. It
304 has high tensile and breaking strength when either dry or wet and low water absorption. The term "hardboard" is widely understood as referring to the product manufactured by Masonite, and is generally used as designating a fiber board product with weight from approximately 30 to 60 lbs. per cubic foot or higher; and the term "fiber structural insulation board" is used as designating a fiber board product weighing less than 25 to 30 lbs. per cubic foot. The qualities and uses of such insulation board are described in paragraph 6 hereof.

19. Hardboard is used in the building industry as wall board, for decorative panelling, for exterior covering, for waterproof panelling in kitchen and bathrooms, for flooring and subflooring, for ceilings, and for forms into which concrete is poured. In addition, hardboard has found a constantly increasing number of

uses in other industries, as, for example, in the furniture, toy, advertising, pleasure boat, automobile, and movie industries. There are other materials which can be used in some cases as substitutes for hardboard, i. e., lumber, plywood, gypsum board, asbestos-cement sheets, wall board, floor coverings, insulation boards, sheet steel, aluminum sheets, asphalt tile, rubber tile, linoleum, terrazzo and travertine flooring, pressed chipped boards, asphalt impregnated chipped boards, cement impregnated insulation boards, vulcanized fiber boards, lath and plaster, ceramic tile, and all other types of interior and exterior wall covering materials. No one of these commodities is fully capable of being put to all of the uses for which hardboard in its various forms is suitable, but one or more of these commodities is capable of being put to each use for which hardboard in its various forms is suitable. The amount in money of the retail sales of hardboard by retail building material dealers is estimated to be substantially less than 1% of the amount in money of sales of building materials by retail
305 building-material dealers as reported in the Preliminary Summary of the 1939 Census of Retail Trade.

20. Defendant Masonite under its former name of Mason Fiber Company began commercial production of hardboard in 1926 in a plant at Laurel, Mississippi. The products (and in part) the processes and apparatus used in their manufacture at that time and since, were covered by the following applications of William H. Mason for U. S. Letters Patent:

Date of filing	Title and subject matter	Number of patent issued on application or division thereof	Date of issue
9/24/24	Process and apparatus for disintegration of wood and the like	1,578,609	3-30-26
9/28/25	Apparatus for and process of explosion fibration of lignocellulose material	1,655,618	1-10-28
9/18/25	Press dried structural insulating board and process of making same	1,663,504	3-20-28
9/18/25	Hard grainless fiber products and process of making same	1,663,505	3-20-28
11/30/25	Process of making composition boards and the like, and apparatus therefore	1,767,539	6-24-30
	Article-handling system (later filed divisional)	1,923,548	8-22-33
	Article-handling system (later filed divisional)	1,923,549	8-22-33

306 Subsequently improvements in products, processes and apparatus were developed and applications for Letters Patent were filed to cover the same.

21. Hardboard products, manufactured by Masonite from wood fiber, have been marketed by Masonite under certain trade names, including "Masonite," "Quartrboard," "Presdwood," and "Temprtile."

22. About 1920, a corporation known as The Celotex Company was organized under the laws of the State of Delaware. Said

The Celotex Company was an important factor in the development of structural insulation board made from bagasse (the by-product resulting from the manufacture of cane sugar). The Celotex Company built the aforementioned plant at Marrero, Louisiana, for the manufacture of structural insulation board and actively carried on the promotion and use and public acceptance of structural insulation board products for many years.

On or about June 30, 1928, Carl Muensch, Vice President of The Celotex Company, stated to a Masonite official that The Celotex Company expected to equip its plant to manufacture a new hard panel board. About August, 1928, The Celotex Company ordered one 20-platen press from Southwark Machine and Foundry Company, which had built Masonite's presses.

23. About October 8, 1928, Masonite caused its patent attorney, H. H. Dyke, to write The Celotex Company a letter suggesting that it drop this proposed manufacture, since unless this should be done U. S. Patent 1,663,505 and Masonite's other patents would be infringed. A copy of said letter marked "Exhibit S–11" is attached hereto and made a part hereof.

24. On or about May 22nd, 1929, a meeting was had in said Dyke's office in New York City between Vice
307 President Treadway B. Munroe of The Celotex Company, Samuel Darby, Jr., its counsel, Brown Katzenbach, Vice President of Masonite, Delos Holden, patent counsel for Masonite, and said Dyke, at which the representatives of The Celotex Company stated that it would go ahead with its proposed manufacture of hard panel board and suggested that Masonite license The Celotex Company under Masonite's patents and The Celotex Company license Masonite under applications stated to be then pending, but this suggestion was never carried out.

25. Following this meeting correspondence was carried on between Masonite and The Celotex Company wherein Masonite asked to inspect The Celotex Company's plant and processes. The Celotex Company agreed that this should be done, provided its representatives should be allowed to visit and inspect the Masonite plant and processes, but neither of such inspections was ever carried out.

26. In the first part of the year 1929 The Celotex Company installed a press supplied by Southwark Machine and Foundry Company and other machinery in its plant at Marrero, Louisiana, at a cost to it of about $100,000, for the production of hard panel board, using bagasse, a sugar cane fiber, from which to manufacture said product. When the installation was completed. The Celotex Company began to manufacture and sell a product under the trade name of "Celotex hard panel board." This product had similar physical characteristics to hardboard and

was capable of being used for most of the purposes for which hardboard was used. The hard panel board products, as at first manufactured by The Celotex Company, were of varying quality and strength and in many instances were of lighter weight and lesser strength than Masonite's hardboard products. The Celotex hard panel board was sold in interstate commerce in
308 competition with Masonite's hardboard products and was marketed at prices lower than those at which Masonite sold its hardboard products.

27. In February 1929, the Celotex Company, in an issue of its publication entitled the "Celotex News," announced its intention to engage in the production and distribution of a fiber composition board having certain alleged characteristics which, in fact, were similar to the characteristics possessed by Masonite's hardboard products.

28. About March 1929, Masonite circulated a letter to about 17,000 building material dealers and others interested in fiber board products throughout the United States. A copy of this letter marked "Exhibit S–12," is attached hereto and made a part hereof.

29. At times between 1929 and 1931, beginning with the above mentioned meeting at Dyke's office on May 22, 1929, The Celotex Company and Masonite negotiated with a view of avoiding patent litigation by entering into a cross-licensing agreement whereby The Celotex Company would obtain a license to manufacture under Masonite's hardboard patents and Masonite would, in turn, obtain a license to manufacture under applications for patents owned by The Celotex Company. Masonite refused to enter into any such agreement with The Celotex Company.

30. On May 6, 1930, The Celotex Company sent to Masonite a letter, a copy of which marked "Exhibit S–13" is attached hereto and made a part hereof. On June 25, 1930, Masonite gave formal written notice to The Celotex Company that it was infringing United States Patent No. 1,767,539 which had just been issued on June 24, 1930 to William H. Mason and assigned to Masonite.

On April 2, 1931, Masonite instituted suit against The
309 Celotex Company in the United States District Court for the District of Delaware on Masonite's Patent No. 1,663,505.

31. The Celotex Company (whose assets and business were later acquired by The Celotex Corporation) from the fall of 1929 until 1932 suffered a severe decline in demand for its products and sustained large operating losses. As a result of this decline in business, and operating losses sustained by it as well as other causes, its affairs became so involved that in June of 1932 a complaint was filed by one of the creditors of The Celotex Company

in the District Court of the United States for the District of Delaware, seeking the protection and preservation of the property, business, and assets of the corporation, the appointment of Receivers to take over and conduct the business and affairs of the corporation under the direction of said Court and the liquidation of the corporation.

On June 16, 1932, the Honorable John P. Nields, sole presiding Judge of the District Court of the United States for the District of Delaware, entered a decree of said Court, appointing Colin C. Bell, of Wilmington, Del., and Hobart P. Young, of Chicago, Ill., Receivers of The Celotex Company and its property, a copy of which order is submitted herewith as "Exhibit S–14" and made a part hereof. Thereafter, on June 17, 1932, ancillary receivership proceedings were instituted in the District Court of the United States for the Northern District of Illinois, Eastern Division, and said Hobart P. Young, was appointed ancillary receiver by order of that Court over the property of The Celotex Company located in that jurisdiction. A copy of said order is submitted herewith as "Exhibit S–15" and made a part hereof. Said receiverships continued until February 8, 1935, when the United States District Court of Delaware appointed temporary Trustees for the business and affairs of The Celotex Company under Section 77B of the Bankruptcy Act, a copy of which order is
310 submitted herewith as "Exhibit S–16" and made a part hereof. Said Trustees were appointed permanent Trustees by said Court on March 1, 1935, a copy of the order is submitted herewith as "Exhibit S–17" and made a part hereof.

When on or about April 2, 1931, Masonite instituted suit against The Celotex Company in the United States District Court for the District of Delaware, it charged The Celotex Company with infringement of Masonite's United States Patent No. 1,663,505. The Celotex Company answered inter alia that Masonite's said patent was invalid and was not infringed. The Celotex Company defended said suit until June 16th, 1932, when the Receivers were appointed for The Celotex Company, as aforesaid. Upon their appointment, such Receivers for The Celotex Company were ordered by the said District Court by said order Exhibit S–14 to become parties to and assume the defense of all pending litigation which included said patent cause which was then pending undetermined in said Court; and they thereafter had charge of the further defense of said suit through counsel retained by them. A copy of a further order formally making the Receivers parties defendant to said patent suit is attached hereto as "Exhibit S–18" and made a part hereof.

Thereafter, on October 19th, 1932, the United States District Court for the District of Delaware (Judge John P. Nields pre-

siding) held that Masonite's Patent No. 1,663,505 was valid but limited to products made of natural wood fiber, and therefore not infringed. The said decision of the District Court is reported in 1 Fed. Supp. 494. The decree dismissing the bill was entered December 2, 1932.

Masonite thereupon filed an appeal to the United States Circuit Court of Appeals for the Third Circuit. Said Receivers of The Celotex Company pursuant to order of said District Court
311 undertook the defense of said appeal in the Circuit Court of Appeals and were parties to said appeal. On July 6th, 1933, the Circuit Court of Appeals for the Third Circuit (one Judge dissenting) reversed the decision of the lower court (the United States District Court for the District of Delaware) and held that Masonite's Patent No. 1,663,505 was valid and infringed. The said decision of the Circuit Court of Appeals is reported in 66 Fed. (2d) 451. The Receivers of The Celotex Company applied for a rehearing which was denied by the Circuit Court of Appeals on August 16th, 1933, and thereupon such Receivers of The Celotex Company, on or about September 12, 1933, filed a petition for a writ of certiorari to the Supreme Court of the United States. Such petition was opposed by Masonite by brief filed on or about October 6th, 1933.

Following the denial by the Circuit Court of Appeals of the application for a rehearing, the ancillary Receiver of The Celotex Company applied to the said United States District Court in Illinois for and obtained an order authorizing his entering into the "Agency Agreement and License Option" of October 10, 1933, and the "Supplemental Agreement" of October 10, 1933, being the agreements with Masonite hereinafter referred to in paragraph 33 of this stipulation. A copy of said order is attached hereto, marked "Exhibit S–19" and made a part hereof. Said Delaware Receivers also applied to the District Court of the United States for the District of Delaware for a similar order. Said Honorable John P. Nields (District Judge) on October 12, 1933, entered his order authorizing the Receivers to dismiss said petition for certiorari and to enter into said proposed agreements with Masonite. A copy of said order is attached hereto marked "Exhibit S–20" and made a part hereof. Pursuant to said order of said Court said petition for certiorari was withdrawn on the joint consent of said Receivers for The Celotex Company and Masonite on or about October 10, 1933, and an order of dismissal thereof entered by the Supreme Court on or about October 16,
312 1933. Such order of dismissal is reported in 290 U. S. 708.

The mandate of the Circuit Court of Appeals for the Third Circuit was filed in the United States District Court for the District of Delaware on or about October 20th, 1933. A copy

of the final decree in said suit entered upon said mandate on or about December 8th, 1933, is attached hereto marked "Exhibit S–21" and made a part hereof.

32. On October 10, 1933, when the petition of said Receivers for certiorari was withdrawn, Masonite's sales outlets were limited in number. The patent litigation had been expensive and Masonite had been forced to borrow money from the banks on the credit of its directors as endorsers. Copy of its balance sheet for its fiscal year ended August 31, 1933, and its profit and loss statement for said fiscal year is attached hereto, marked "Exhibit S–22A and B" and made a part hereof. The building industry is a difficult industry into which to introduce new products, and to get a broad distribution of a new building product requires trained engineering and sales forces and contacts with architects, engineers, retail lumber dealers and contractors. On application of Masonite, new railroad tariff classifications were obtained during the year 1926, pursuant to which hardboard and structural insulation board could be combined in mixed carlot quantities (including pool car shipments), thus obtaining substantial savings in freight for Masonite or any carlot shipper of both hardboard and structural insulation board by reason of the carload freight rates so made applicable on such mixed and pool car shipments. This also enabled dealers to obtain a diversified stock of hardboard and insulation board products with substantially less inventory and with resultant savings in the dealers' capital outlay which would otherwise be required.

33. On October 10, 1933, Masonite and the Receivers for The Celotex Company, pursuant to the orders referred
313 to in paragraph 31 hereof, entered into agreements entitled (a) "Agency Agreement and License Option," a copy of which, marked "Exhibit S–23," is submitted herewith and made a part hereof, and entitled (b) "Supplemental Agreement," a copy of which, marked "Exhibit S–24," is submitted herewith and made a part hereof.

34. In 1935 there came on for hearing and disposition in the District Court of the United States for the District of Delaware, before the Honorable John P. Nields, sole Judge of said Court, a Plan of Reorganization of The Celotex Company in said bankruptcy proceedings under Section 77B of the Bankruptcy Act above referred to. Said plan designated The Celotex Corporation, a new Delaware corporation, as the corporation to acquire the assets and business formerly carried on by The Celotex Company. Upon said plan being presented and hearings held a decree of confirmation of said plan was entered in said cause, a copy of which decree of confirmation is submitted herewith as "Exhibit

S-26" and made a part hereof. Pursuant to the provisions of said decree of confirmation, the Trustees of The Celotex Company thereupon assigned and conveyed the property, business and assets of the debtor company to The Celotex Corporation.

35. During the year 1930 Insulite began the production of an artificial hardboard marketed as "Insulite Hardboard." Some of this board produced by Insulite was sold directly to the building trade and to industrial buyers by Insulite and some of it was sold by Insulite to defendant Wood Co version for resale under Wood Conversion's own brand name. This product had similar physical characteristics to hardboard and was capable of being used for most of the purposes for which hardboard was used. A true and correct list of the patents relating to such artificial hardboard issued to Insulite by February, 1935 and patents
314 issued to Insulite on applications which it had filed by said date, when the agreements between Masonite and Insulite referred to in paragraph 38 of the stipulation were executed, is attached hereto marked "Exhibit S-26" and made a part hereof.

36. On March 3, 1934 Masonite filed an infringement suit in the United States District Court of Pennsylvania against The Faxon Lumber Company, Williamsport, Pennsylvania, which was a dealer in an artificial hard board manufactured by Insulite and which suit charged infringement of Masonite's United States Patent No. 1663505. Since Insulite manufactured the board product distributed through The Faxon Lumber Company, it had a substantial interest in the outcome of this suit. Insulite was a wholly owned subsidiary company of Minnesota and Ontario Paper Company, a Maine corporation, with its principal office in Minneapolis, Minnesota, and on February 28, 1931 Equity Receivers were appointed for said parent company by the United States District Court, District of Minnesota, Fourth Division and continued under the order of appointment until July, 1934. On March 22, 1934 said Equity Receivers of Minnesota and Ontario Paper Company petitioned said United States District Court for authority to cause its subsidiary company, Insulite, to defend against the suit brought by Masonite against The Faxon Lumber Company and by order dated March 31, 1934, and signed by Judge Joseph W. Molyneaux of said United States District Court, said Equity Receivers were authorized to cause Insulite to defend said suit on behalf of Insulite and of The Faxon Lumber Company and pursuant to said authorization, Insulite did enter upon the defense of said suit. A copy of the order appointing said Receivers and a copy of the order authorizing Insulite to defend said suit are submitted herewith marked "Exhibit S-27" and "Exhibit S-28" respectively and made a part hereof.

315 37. In July, 1934, the United States District Court, District of Minnesota, Fourth Division, appointed Trustees of Minnesota and Ontario Paper Company under Section 77B of the Bankruptcy Act of the United States and the appointment of said Trustees was made permanent by order of said court dated September 29, 1934 and thereafter the parent company of Insulite continued under Section 77B until February 28, 1941, at which time a Plan of Reorganization was consummated. By order dated February 2, 1935, signed by Judge Joseph W. Molyneaux of said United States District Court, said Trustees of the parent company, Minnesota and Ontario Paper Company, were authorized to cause Insulite to execute the agreements with Masonite specified in paragraph 38 hereof and to enter into a dismissal of the suit against The Faxon Lumber Company. Pursuant to said order Insulite entered into said agreements and dismissed said suit. A copy of said order of February 2, 1935 is attached hereto marked "Exhibit S–29" and made a part hereof. At the time of the entry of the said order of dismissal no answer had been filed in said patent suit.

38. As a result of negotiations, and following the determination of the validity of Masonite's patent by the Circuit Court of Appeals, the following companies entered into the agreements with Masonite on the dates set opposite their respective names:

316 Title of agreements	Company	Date
Agency Agreement and License Option	National Gypsum	Oct. 31, 1933
Agency Agreement and License Option, Supplemental Agreement.	Johns-Manville Sales	Nov. 30, 1933
Agency Agreement and License Option, Supplemental Agreement.	Armstrong	Dec. 1, 1933
Agency Agreement and License Option	Hawaiian Cane Products, Ltd.	Dec. 4, 1933
Agency Agreement and License Option, Supplemental Agreement.	Wood Conversion	June 25, 1934
Agency Agreement and License Option, Supplemental Agreement.	Insulite	Feb. 2, 1935
Export Agreement	Insulite	Feb. 2, 1935
Supplemental Agreement	Insulite	Feb. 8, 1935
Agency Agreement and License Option, Supplemental Agreement.	Agasote Millboard Co.	Jan. 4, 1934

39. A true and correct copy of each of the aforementioned agreements and agreements supplementary thereto are submitted herewith as exhibits and made a part hereof. A list of these contracts showing the exhibit number which each one bears follows:

(a) Agreement between Masonite and National Gypsum Company dated October 31, 1933, marked "Exhibit S–30."

(b) Agreement between Masonite and Johns-Manville Sales Corporation dated November 30, 1933, marked "Exhibit S–31."

317 (c) Supplemental agreement to the foregoing and of even date therewith, marked "Exhibit S–32."

(d) Agreement between Masonite and Armstrong-Newport dated December 1, 1933, marked "Exhibit S–33."

(e) Supplemental agreement to the foregoing and of even date therewith, marked "Exhibit S–34."

(f) Agreements between Masonite and Hawaiian Cane Products, Ltd., dated December 4, 1933, marked "Exhibit S–35."

(g) Agreements between Masonite and Agasote Millboard Company dated January 4, 1934, marked "Exhibit S–36."

(h) Supplemental agreement to the foregoing and of even date therewith, marked "Exhibit S–37."

(i) Agreements between Masonite and Wood Conversion Company dated June 25, 1934, marked "Exhibit S–38."

(j) Supplemental agreement to the foregoing, and of even date therewith, marked "Exhibit S–39."

(k) Agreement between Masonite and The Insulite Company dated February 2, 1935, marked "Exhibit S–40."

(l) Supplemental agreement to the foregoing, and of even date therewith, marked "Exhibit S–41."

(m) Further Supplemental agreement to the foregoing, under date of February 8, 1935, marked "Exhibit S–42."

318 (n) An "Export Agreement" made between Masonite and Insulite, dated February 2, 1935, together with a supplemental agreement, dated February 8, 1935. Both of the said agreements are marked "Exhibit S–43."

40. On November 10, 1938, the contract between Masonite and Agasote Millboard Company, dated January 4, 1934, was cancelled.

41. On October 29, 1936, Masonite entered into new agreements with The Celotex Corporation, National Gypsum, Johns-Manville Sales, Armstrong, Wood Conversion, Insulite, and Hawaiian Cane Products, Ltd. These agreements, together with certain supplemental agreements which Masonite entered into with said defendants on the same date were substituted for and superseded the agreements entered into with the said defendants during the period from October 10, 1933, to February 8, 1935, and referred to in paragraphs 38 and 39 of this stipulation.

42. Each of the contracts referred to in paragraph 41 became effective on October 29, 1936. A copy of the principal agreement entered into by Masonite with The Celotex Corporation on October 29, 1936, marked "Exhibit S–44," is made a part hereof. Each of the principal agreements made between Masonite on October 29, 1936, and Armstrong, Hawaiian Cane Products, Ltd., Insulite, Johns-Manville Sales, National Gypsum, and Wood

Conversion, is identical in form and substance with the agreement between Masonite and The Celotex Corporation embodied in "Exhibit S–44" (excepting only the names and signatures of the parties). A printed copy of each of the supplemental agreements entered into on October 29, 1936, by Masonite and each of the following companies—to wit, Armstrong, Hawaiian Cane Products, Ltd., Insulite, Johns-Manville Sales, National Gypsum, Wood Conversion, and The Celotex Corporation, marked "Exhibit S–45," is submitted herewith and made a part hereof.

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43. Contemporaneously with the making of the agreement between Masonite and Hawaiian Cane dated December 4, 1933, referred to in paragraph 38 hereof, Certain-teed began the sale and distribution of hardboard products manufactured by Masonite within the continental United States as agent for Hawaiian Cane with the consent of Masonite. By agreement dated January 30, 1937, Hawaiian Cane transferred and assigned to defendant Certain-teed all of the Hawaiian Cane's rights, duties, and obligations under its agreement with Masonite, referred to in paragraphs 41 and 42 above, relating to the sale and distribution of hardboard within the continental United States and Alaska. Hawaiian Cane retained the right to continue selling and distributing hardboard in the Hawaiian Islands. Masonite consented to this assignment, and pursuant thereto and on or about January 30, 1937, defendant Certain-teed began selling and distributing hardboard products manufactured by Masonite within the continental United States. Such sales by defendant Certain-teed were made under the terms and conditions prescribed by said agreement with Masonite dated October 29, 1936.

44. On March 16, 1937, Masonite entered into an agreement with defendant Flintkote, a true and correct copy of which, marked "Exhibit S–46," is submitted herewith and made a part hereof. Prior to the date of the execution of this agreement, Flintkote had been selling hardboard produced by Masonite pursuant to arrangements existing between Flintkote an Insulite.

45. On June 19, 1937, Masonite entered into an agreement with defendant Dant & Russell, a true and correct

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copy of which, marked "Exhibit S–47," is submitted herewith and made a part hereof.

46. In 1937 and 1938 Masonite was involved in an interference proceeding in the United States Patent Office with Insulite, and Masonite asserted that a Finnish subsidiary of Insulite was infringing Finnish patents of Masonite. These matters were compromised and settled, and their Export Agreement of February 2, 1935, and their further supplement thereto of February 8, 1935, were modified by an agreement between Masonite and Insulite

which was entered into on or about February 1, 1938. A copy of said agreement is submitted herewith, marked "Exhibit S–48" and made part hereof. Said agreement provided for settlement of interferences upon exchange of data relative to priority, and said interference proceeding was settled in this manner with concession of priority made in favor of Insulite, and thereupon the interfering claims were awarded to Insulite and said claims were included in Insulite patent No. 2,134,659. Insulite licensed Masonite under said patent in the agreement of February 1, 1938, aforesaid.

47. At the time of the making of the agreements referred to in Paragraphs 38, 39, 41, 42, 44, and 45, each of the defendants with whom Masonite made such agreements had a large force of salesmen well trained in selling to the building industry and in touch with architects, building engineers, dealers, wholesalers, etc. Each of such defendants had at such times sales offices located in various states of the United States and many warehouses strategically located in different parts of the United States, such offices and warehouses in the case of each of such defendants being located both near the Atlantic Seaboard and near the Pacific Seaboard, and at various points in the intervening territory, and at the said times and at all times since, the said defendants have been and are national distributors of large quantities of various materials used in building.

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48. Masonite never availed itself of the option to require any of the other defendants herein to advance to it one-half the difference between Masonite's carlot list prices to its dealers and the current commissions thereon, as provided in Sec. 7 of the Del Credere Factor's Agreements, and license options referred to in paragraphs 41, 42, 44, and 45 of this stipulation.

49. On August 26, 1940, Masonite sent to each of the other defendants a letter referring to the agreements mentioned in paragraphs 41, 42, 44, and 45 hereof relating to "shorts." A copy of the letter sent to defendants Armstrong, Certain-teed, Insulite, Johns-Manville Sales, Celotex, National Gypsum and Wood Conversion, is submitted herewith and marked "Exhibit S–49." A copy of the letter to Dant & Russell and Flintkote is attached hereto and marked "Exhibit S–50."

50. As of March 20, 1941, Masonite entered into new agreements with The Celotex Corporation, National Gypsum, Johns-Manville Sales, Armstrong, Wood Conversion, Insulite, Certain-teed, Flintkote, and Dant & Russell. These agreements are identical except as to signatures and dates and a copy therof is submitted herewith, marked "Exhibit S–51" and made a part hereof. As of the same date Masonite entered into supplemental agreements with The Celotex Corporation and Insulite. A copy of

the supplemental agreement with The Celotex Corporation and a copy of the two supplemental agreements with Insulite, above referred to in this paragraph, are attached hereto
322 and marked "Exhibits S–52 and S–53A and B," respectively. All of said agreements were executed about April 1, 1941, and are presently in force and effect.

51. As of March 31, 1941, Masonite entered into an agreement with Hawaiian Cane Products, Ltd., which agreement was identical, except as to signature and date, with the agreements referred to in paragraph 50 of this stipulation, excepting only that the territory was limited to the Hawaiian Islands and said agreement is in force and effect.

52. While acting under the various agreements referred to in paragraphs 38, 39, 41, 42, 44, and 45 the defendants sold and distributed the hardboard manufactured by Masonite. Some of the defendants sold and distributed such Masonite hardboard without attaching any brands thereto and others after attaching trade names and trademarks. Attached hereto is a table showing the trade names and trade-marks adopted and used by the various defendants and listing the cases in which the boards were branded or were unbranded, which table is attached hereto, marked "Exhibit S–54" and made a part hereof.

53. Throughout the period from October 9, 1933, up to and including the date hereof, Masonite from time to time issued price lists showing prices to dealers for its various hardboard products, and all its sales of hardboard to dealers were at such prices. A true and correct copy of each of these price lists so far as available is submitted herewith as an exhibit and made a part hereof. The said price lists are bound in a book and marked "Exhibits S–55." Each of the said price lists was effective from the date stated on its cover until its cancellation by a succeeding price list. All of the prices for hardboard products ap-
323 pearing in said price lists were directed by Masonite under the agreements mentioned in paragraphs 38, 39, 41, 42, 44, 45, 50, and 51 to be observed by the other defendants, in making sales to dealers of hardboard furnished to them by Masonite under the terms of said respective agreements.

54. Each of the defendants herein, other than Masonite, throughout the period of time during which it sold hardboard produced by Masonite was authorized and directed by Masonite under the agreements aforesaid to sell and did sell the said hardboard in interstate commerce to dealers at the prices shown in the dealer price lists issued by Masonite and referred to in paragraph 53 hereof.

55. Each of the defendants herein, other than Masonite, throughout the period of time they sold hardboard produced by

Masonite, was authorized and directed by Masonite under the agreements aforesaid to make, and did make sales in interstate commerce of such hardboard to wholesalers at such discounts off Masonite's dealer prices as were shown in Masonite's functional service compensation schedules in effect from time to time, copies of which will be produced at the trial. Masonite itself made all its sales to wholesalers at the discounts off Masonite's dealer price list shown in said schedules.

56. A table showing annual sales of hardboard produced by Masonite during each of the fiscal years from 1928 to 1940, including export sales, segregated to show the amounts distributed by defendants other than Masonite for each of the fiscal years from 1933 to 1940, the amounts distributed by Masonite's own sales force during the fiscal years 1928 to 1940, segregated as to such sales by Masonite's sales force to show sales made

324 (a) in export;

(b) since 1933 to industrial purchasers; and

(c) to all others, including dealers, wholesalers and Governmental agencies, is attached hereto, marked "Exhibit S–56," and made a part of this stipulation.

57. A table showing the total annual sales of hardboard products by Insulite during each of the years from 1930 to 1939, segregated to show sales of hardboard products by Insulite (a) to dealers, wholesalers, and government agencies, (b) to industrial trades, and (c) for export, is attached hereto, marked "Exhibit S–57," and made a part of this stipulation.

58. On May 15, 1934, letter agreements were entered into between the United States Gypsum Company and Masonite whereby Masonite agreed to sell to the United States Gypsum Company hardboard produced by Masonite, and United States Gypsum Company agreed to sell to Masonite light-colored insulation board produced by United States Gypsum Company. True and correct copies of these letter agreements between Masonite and United States Gypsum Company, marked "Exhibits S–58 and S–59" respectively, are attached hereto and made a part hereof.

59. From May 15, 1934, to July 1, 1937, United States Gypsum purchased from Masonite substantial quantities of "Quartrboard" at the prices specified in the said letter agreement of May 15, 1934, to wit: $19.50 per thousand square feet. On July 1, 1937, Masonite announced a reduction in the price of "Quartrboard" to dealers and from that date until January 26, 1940,

325 United States Gypsum Company purchased substantial quantities of "Quartrboard" from Masonite at the price of $16.90 per thousand square feet. On January 26, 1940, Masonite announced an increase in the price of "Quartrboard" to dealers and from that date until September 15, 1940, when said agree-

ment was cancelled, United States Gypsum Company purchased substantial quantities of "Quartrboard" from Masonite at the price of $18.20 per thousand square feet.

60. Commencing in 1934, the United States Gypsum Company entered into the production of various fiber board products, some of which it designated as "hard panel board". Starting about August 10, 1934, United States Gypsum Company and Masonite were parties in interference proceedings in the United States Patent Office, and thereafter in the United States District Court for the District of Delaware, to determine priority of invention to certain processes for manufacturing hardboard. On July 13, 1937, the interference proceedings was finally determined in favor of Masonite by decision of the Board of Appeals of the Patent Office from which no appeal was taken. On August 30, 1937, United States Gypsum Company and Manvel C. Dailey commenced an action under Section 4915 U. S. R. S. in the United States District Court for the District of Delaware against Masonite and William H. Mason, to redetermine and review the questions of priority of invention that had been in interference in the United States Patent Office, and on June 15, 1939, the suit was dismissed on application of plaintiffs. Since that time United States Gypsum Company notified Masonite that it had changed its process of manufacture and that such process did not infringe Masonite's patents, but refused to divulge its changed methods of manufacture.

326 61. After 1934, United States Gypsum Company purchased hardboard products from Masonite in interstate trade and commerce and resold the same in interstate trade and commerce. It has also sold its products designated as "hard panel board" in interstate trade and commerce. This product, "hard panel board," is capable of being put to most of the same uses as hardboard. Throughout this period United States Gypsum Company from time to time issued its price list showing its prices to dealers for its various fiber board products. A copy of each of these price lists, as produced by the plaintiff, is submitted herewith as an exhibit and made a part hereof. The said price lists are submitted herewith, marked "Exhibit S-60" and made a part hereof. So far as is known to plaintiff and defendants, these price lists were in effect from the date stated on their respective covers until their cancellation by succeeding price lists and various fiber board products were sold to dealers by United States Gypsum Company at prices shown in the aforesaid price lists.

62. After 1934 United States Gypsum Company, from time to time issued lists showing prices and terms at which its various fiber board products would be sold to concerns which it classified as wholesalers. Copies of the said wholesale price lists, as pro-

duced by plaintiff, are submitted herewith as exhibits and made a part hereof. The said wholesaler price lists are submitted herewith, marked "Exhibit S–61" and made a part hereof. So far as is known to plaintiff and defendants, these price lists were in effect from the date stated on their respective covers until their cancellation by succeeding price lists and various fiber board products were sold by United States Gypsum Company to concerns which it classified as wholesalers at prices shown in the aforesaid price lists.

327 63. Commencing in 1934 and into 1939, United States Gypsum Company sold hardboard purchased from Masonite, the volume of which amounted to between 2% and 3% of Masonite's total sales of hardboard during said period; and commencing in 1934, United States Gypsum Company has sold the product which it has denominated "hard panel board" and the sales of this product approximate 3% of Masonite's total sales of hardboard during said period.

64. At present only Masonite and Insulite manufacture hardboard in the United States; and the only other company which produces in the United States an artificial hard board similar to the hardboard produced by Masonite is United States Gypsum Company. All of the hardboard manufactured by Insulite is manufactured under export agreement with Masonite and is exported for sale and use in foreign countries. Masonite has commenced an action against United States Gypsum Company in the United States District Court for the Northern District of Illinois for infringement of its hardboard patents by reason of the manufacture and sale by United States Gypsum Company of an artificial board, called by various names, and claimed by Masonite to infringe its patents in the United States. A copy of the complaint is attached hereto marked "Exhibit S–62" and made a part hereof.

65. A true and correct copy of the "Annual Report" of Masonite for each of the fiscal years ended August 31, 1933 to and including August 31, 1940 is submitted herewith marked "Exhibits S–63A to S–63H," and made a part hereof.

66. Masonite employs at the present time about two thousand employees, furnishes them and their families with
328 complete medical and hospital facilities, and is paying the highest hourly labor wage scale in the State of Mississippi. Salaries of Masonite's top executives and elected officers (never more than five in number at any one time) during the years 1929 through 1939 ranged from approximately $6,000 to a maximum of slightly under $33,000 per year. Prior to 1933 the President served without compensation. Directors have always served without compensation, and the bonus plan now in effect for employees excludes directors and chief executive officers. None of the officers

or directors of Masonite is or has been an officer or director of any of the other defendants, and there is no interlocking of directorships between Masonite and any of the other defendants.

Dated,

_____ _____, Special Assistant to the Attorney General; _____ _____, Special Attorneys; _____ _____, Assistant Attorney General; _____ _____, Attorneys for Defendant Masonite Corporation; _____ _____, Attorneys for Defendant Celotex Corporation, _____ _____, Attorneys for Defendant Certain-teed Products Corporation; _____ _____, Attorneys for Defendant Johns-Manville Sales Corporation; _____ _____, Attorneys for Defendant Insulite Company; _____ _____, Attorneys for Defendant Flintkote Company; _____ _____, Attorney for Defendant National Gypsum Company; _____ _____, Attorneys for Defendant Wood Conversion Company; _____ _____, Attorneys for Defendant Armstrong Cork Company; _____ _____, Attorney for Defendant Dant & Russell, Inc.

329

329-A

Exhibit S-1

Patented Mar. 20, 1928. 1,663,505

UNITED STATES PATENT OFFICE

WILLIAM H. MASON, OF LAUREL, MISSISSIPPI, ASSIGNOR TO MASON FIBRE COMPANY, OF LAUREL, MISSISSIPPI, A CORPORATION OF DELAWARE

Hard Grainless Fibre Products and Process of Making Same

No Drawing. Application filed September 18, 1925. Serial No. 57,252

My invention relates to hard, grainless fiber products and process of making same.

Ligno-cellulose materials, such as wood, and the like are adapted for use in making my improved products.

The principal object of the invention is the production from natural wood, usually waste pieces from saw mills, of coherent grainless, hard, dense, stiff and strong products having practically all the characteristics of natural wood, but of increased density, and remade so as to be without grain and free from the weakness which natural wood has "across the grain."

Other objects will appear in connection with the following description of my new product and the process of its making.

The raw material, such as wood in small pieces or chips, is first converted into fiber. The fiber is preferably prepared by explosion from a gun through a constricted outlet or outlets under high pressure, preferably steam pressure of about 275# to 1000# per sq. in., but the wood may be ground or transformed into fiber in other ways, so long as practically all the constituents are disintegrated into substantially fibrous state and the fibers are not unduly chopped or shortened. Chemically digested fiber from which the lignins have been substantially removed is not adapted for the purposes of my invention, practically all, or at least the larger part of the natural lignins present in the wood or woody material being necessary to be retained and incorporated in my product in order to obtain thorough cohesion throughout the fibrous body. Fiber made by explosion as described is particularly well adapted for making a hard, grainless product because the resulting fiber contains practically all the original substance of the wood or woody material in a good state of subdivision, including subdivision of a portion of such material into its ultimate fibers, and the remainder into bundles of such fibers, which bundles, however, are finely shredded and well adapted for water penetration and softening, and which substantially fibrous material is adapted for becoming effectively bonded or welded together when dried by application of heat and pressure as hereinafter described. With such fiber, refinement as by beating or the like is not essential, and if there is any further refinement, same is preferably not extensive.

The fiber is preferably formed into sheet form from a water bath, which may contain materials for making the product more waterproof or fire resistant, or both. Complete uniformity in sheet thickness is not always essential, as the material is somewhat plastic, and when products of special forms are to be produced, the material need not necessarily be first made into sheet form.

Some of the excess water may be eliminated, as by passing through squeezing rolls. This is, however, largely a matter of convenience, and use of squeezing rolls may be dispensed with, if desired.

In the formation in water into sheet or the like form, the fibers and fibrous bundles are softened and become criss-crossed in various directions, so that the resulting product will be grainless and will have substantially like strength and stiffness in all surface directions.

The moist fibrated material is dried under heat and pressure and consolidated into a firmly coherent body, the fiber sheet being first cut into lengths as desired, and the cut sections introduced into a heated press, as, for example, between steam heated press platens, pressure and is maintained continuously and preferably

without diminution in the press during solidifying and so as to follow up the product being pressed as shrinkage takes place. To obtain best results no material release of pressure should take place until the drying and solidification of the product is substantially complete.

Pressures of from 200# to 70# per sq. in. give very satisfactory results in producing a hard, dense product, but variations in pressure above and below these amounts may be resorted to, if desired. In extended commercial practice of the invention, pressures of approximately 300# per sq. in. have been found to give best all-round results. Extremely high pressures, such as 1500# per. sq. in. or more, are preferably to be avoided because products made under such pressures are relatively brittle. Drying takes place rapidly, the water being quickly reduced to a low proportion by the squeezing during the closing of the press, and close contact being made with the hot press platens under the pressures used. The press platens are heated to a temperature sufficient with the pressures used to produce a hard, coherent body of fibrous material. With steam heated press platens, which are preferably used, while fairly satisfactory results can be obtained with lower temperatures, to secure best results, the steam for heating the press platens is preferably at a pressure over 70# per sq. in., and considerably higher temperatures, as, for example, temperature of steam at 100# per sq. in. may be used, so long as overheating and charring is avoided. Some charring along the edges is not necessarily objectionable, as the product is ordinarily trimmed.

Moist fiber sheets which are about ¾" thick, for example, as they come from the squeezing rolls, after being dried and solidified in the manner described, are about ⅛" to 3/16" thick when removed from the press, are of substantially permanent gage dimension, dense, stiff and strong, and have all the qualities characteristic of natural wood in the direction of its grain in as great or greater degree than the wood, with the difference that the product is grainless and has no direction of weakness corresponding to that of wood "across the grain."

Such products can be trimmed or worked with ordinary wood-working tools, but ordinarily need no planing or other surfacing, being a true reproduction of the press platen surface, which may be plane or may be of various forms so as to produce moldings, panels, casings and the like.

The product made in the manner described is very dense, the density being practically uniform throughout its thickness, has a specific gravity of approximately one, and is resistant to absorption of water, and with addition of size additional resistance to water penetration can be obtained.

I attribute the high degree of homogeneity, hardness, denseness and stiffness to the continuous application of pressure and heat to the fibrous mass softened by moisture and containing all or practically all of the original wood or woody constituents until substantially dry, resulting in what may be termed a thorough cohering, coalescing, bonding or welding together of the component parts of the original wood or woody material.

The absence of disruptive action upon releasing the pressure on the hot press is an indication that the product after pressing is so thoroughly dry as to be free from practically all moisture, which if present would be converted into steam with disruptive effect at the high temperatures used, and it is in this sense that I make use of "practically completely freed from moisture in making" and equivalent expressions in certain of my claims. Such expressions are not to exclude some taking up of moisture at a later time as referred to above.

It is of advantage, particularly in securing rapid drying and solidification of the product, to lay the sheet or the like in the press on a screen, as of copper wire mesh or the like, which remains in the press during the operation of drying and solidifying the product. Such a screen affords added opportunity for escape of moisture in the form of steam, and products dried and solidified on such a screen, in addition to taking a shorter time than without the screen, are usually lighter in color, not only on the surface next to the screen, but all the way through, and on the opposite surface from that exposed to the screen. Use of such screens is, of course, not desirable where a product is desired to have smoothly finished surfaces on both its faces.

My product in its best embodiment is free of binders, fillers and the like from extraneous sources, but, obviously, these may be included to some extent, so long as my described process is carried out and a product obtained having substantially the described characteristics.

Cognate subject-matter not claimed herein is embraced in my following co-pending applications: Ser. No. 38,356 filed June 19, 1925; Ser. No. 57,521 filed Sept. 18, 1925; Ser. No. 90,167 filed Feb. 23, 1926; Ser. No. 91,447 filed Mar. 1, 1926.

I claim:

1. An article of manufacture consisting of a coherent, grainless, hard, stiff and strong body of wood or woody material which had been disintegrated into substantially fibrous state, said body being denser than, and comprising practically all the substance of, the original wood or woody material, and practically completely freed from moisture in making.

2. An article of manufacture consisting of a coherent, grainless, homogeneous, hard, stiff and strong body of wood or woody ma-

terial which had been disintegrated into substantially fibrous state, said body comprising practically all the substance of the original wood or woody material and being of specific gravity approximately one, and practically completely freed from moisture in making.

3. An article of manufacture consisting of a coherent, grainless, homogeneous, hard, stiff and strong body of wood or woody material which had been exploded into substantially fibrous state, said body being denser than, and comprising practically all the substance of, the original wood or woody material.

4. An article of manufacture consisting of a coherent, grainless, homogeneous, hard, stiff and strong body of wood or woody material which had been exploded into substantially fibrous state, said body comprising practically all the substance of the original wood or woody material and being of specific gravity approximately one.

329-B 5. An article of manufacture consisting of a coherent, grainless, homogeneous, hard, stiff and strong body of wood or woody material, which had been disintegrated into substantially fibrous state, wet, and dried from moist state under consolidating pressure and heat until practically completely freed from moisture, said body being denser than, and comprising practically all the substance of the original wood or woody material.

6. An article of manufacture consisting of a coherent, grainless, homogeneous, hard, stiff and strong body of wood or woody material, which had been disintegrated into substantially fibrous state, wet, and dried from moist state under consolidating pressure and heat until practically completely freed from moisture, said body comprising practically all the substance of the original wood or woody material and being of specific gravity approximately one.

7. An article of manufacture consisting of a coherent, grainless, homogeneous, hard, stiff and strong body of wood or woody material, which had been exploded into substantially fibrous state, wet, and dried from moist state under consolidating pressure and heat, said body being denser than, and comprising practically all the substance of the original wood or woody material.

8. An article of manufacture consisting of a coherent, grainless, homogeneous, hard, stiff and strong body of wood or woody material, which had been disintegrated into substantially fibrous state, wet, and dried from moist state under consolidating pressure and heat until practically completely freed from moisture, said body comprising practically all the substance of the original wood or woody material, and being of specific gravity approximately one.

9. A grainless, hard board composed of wood which had been disintegrated into substantially fibrous state, and which is denser than and comprises substantially all the substance of the original wood, and practically completely freed from moisture in making.

10. A grainless, hard board composed of wood which had been transformed by explosion into substantially fibrous state, and which comprises substantially all the substance of the original wood, and has a specific gravity of approximately one.

11. A grainless wood product comprising fiber of exploded wood redistributed without grain or order, and caused to cohere by application of heat and pressure to the fiber in moistened condition until substantially dry.

12. A hot pressed grainless wood product comprising fiber of exploded wood rearranged without grain or order, and coalesced or welded together.

13. A hot pressed grainless ligno-cellulose product comprising fiber of exploded ligno-cellulose material rearranged without regard to grain or order, and coalesced or welded together.

14. The process of making a hard, grainless body of wood or woody material which comprises the steps of disintegrating wood or woody material into substantially fibrous material comprising practically all the substance of the original wood or woody material, supplying moisture to said substantially fibrous material, and drying same under consolidating pressure and heat to such extent that the product is not disrupted upon opening the press while still highly heated.

15. The process of making a hard, grainless body of wood or woody material which comprises the steps of exploding wood or woody material into substantially fibrous material comprising practically all the substance of the original wood or woody material, supplying moisture to said substantially fibrous material, and drying same under application of consolidating pressure and heat.

16. The process of making coherent, grainless sheets of wood or woody material which comprises the steps of disintegrating the wood or woody material into substantially fibrous material comprising practically all the substance of the original wood or woody material, soaking said fibrous material with water, forming into sheets and subjecting the sheets of fibrous material to consolidating pressure and heat following up the application of pressure during shrinkage and until practically completely freed from moisture to such extent that the product is not disrupted upon opening the press while still highly heated.

17. The process of making a hard, grainless body of wood or woody material which comprises the steps of exploding the wood

or woody material into substantially fibrous material comprising practically all the substance of the original wood or woody material, soaking said fibrous material with water, and subjecting the most fibrous material to heat and pressure following up the application of pressure during shrinkage and until substantially dry.

18. The process of making a grainless wood product, which consists in fibrating wood by discharging from pressures in excess of 275# per sq. in., compressing under temperature equivalent to the heat of steam at over 70# per sq. in., at a pressure of about 200#–700# per sq. in., and continuing the application of pressure until the fibers are formed into a substantially homogeneous grainless product of high density, strength and specific gravity.

19. The process of making a grainless wood product, which consists in fibrating wood by discharging from pressures in excess of 275# per sq. in. through a constricted outlet or outlets, compressing under temperature equivalent to heat of steam at over 70# per sq. in., at a pressure of about 200#–700# per sq. in., and continuing the application of pressure until the fibrous material is formed into a substantially homogeneous grainless product of high density, strength and specific gravity.

20. The process of making a hard, grainless body of wood or woody material, which comprises the steps of disintegrating wood or woody material into substantially fibrous material comprising practically all the substance of the original wood or woody material, soaking said fibrous material with water, and subjecting the moist fibrous material to pressure of the order of 200#–700# per sq. in. while heating to a temperature of the order of the temperature of steam at approximately 70# per sq. in. or over following up the pressure during shrinkage and until practically completely free from moisture.

21. The process of making a hard, grainless body of wood or woody material, which comprises the steps of exploding the wood or woody material into substantially fibrous material comprising practically all the substance of the original wood or woody material, soaking said fibrous material with water, and subjecting the moist fibrous material to pressure of the order of 200#–700# per sq. in. while heating to a temperature of the order of the temperature of steam at approximately 70#–100# per sq. in., following up the pressure during shrinkage and until substantially dry.

22. The process of making grainless, hard board of wood, which includes disintegrating wood into substantially fibrous material containing practically all the substance of the original wood, soaking and forming in sheets in water, whereby the fibrous material is moistened and softened, cutting into lengths and hot pressing

the sections until dry under application of approximately 200#–700# per sq. in. pressure and heat of approximately 70# per sq. in. or more of steam, and with wire mesh material in contact with at least one side of the sheet being pressed whereby escape of steam and other gasses is facilitated.

23. In the process of making hard, grainless board, the step of drying and consolidating moist sheets of wood or woody material, which had been substantially fibrated and comprising substantially all the substance of the original wood or woody material, under application of heat and pressure sufficient to secure practically complete freedom from moisture and to produce a product of higher density than the original wood or woody material.

24. The process of drying and bonding together substantially fibrous material containing practically only and practically all the substance of wood, which comprises applying heat and pressure to such material in initially moist condition until practically completely free from moisture and permanently bonded together.

25. Process of pressing fiber from wet state between platens heated above the boiling point of water with a wire mesh screen interposed between press platen and at least one face of the body of fiber and continuing the application of heat and pressure until a hard product is produced practically completely free from moisture.

26. A hard, dry fiber product containing substantially all the lignins and other constituents of wood which had been disintegrated to fibrous state and coalesced together under heat and pressure and having on at least one face thereof a wire-mesh-impression surface.

In testimony whereof, I have signed my name hereto.

WILLIAM H. MASON.

CERTIFICATE OF CORRECTION

Patent No. 1,663,505.

Granted March 20, 1928, to William H. Mason.

It is hereby certified that error appears in the printed specification of the above numbered patent requiring correction as follows: Page 3, line 112, claim 17, for the word "most" read "moist"; and that the said Letters Patent should be read with this correction therein that the same may conform to the record of the case in the Patent Office.

Signed and sealed this 1st day of May A. D. 1928.

[SEAL] M. J. MOORE,

Acting Commissioner of Patents.

330 *Exhibit S–2—List of the Principal Materials Manufactured or Distributed by The Celotex Corporation*

Boards:
- Insulation Board Products.
- Hardboard Products.
- Fibre Wallboard.
- Asbestos Cement Surfaced Fibre Board.
- Absorbent Concrete Form Lining Board.

Insulating Materials (other than board):
- Rock Wool (Loose, batts and blankets).
- Wood Fibre Insulation.
- Acoustical Materials.
- Industrial Insulations.

Roofing and Siding:
- Asphalt shingles and Roll Roofing.
- Tarred and Asphalt Felts.
- Roof Saturants, Cements, Pitch and Accessories.
- Building Papers.

Gypsum Products:
- Gypsum Wallboard.
- Gypsum Sheathing.
- Gypsum Lath and Liner Board.
- Gypsum Plasters.
- Water-paints.
- Patching plasters and other accessories and specialties.

Miscellaneous Products:
- Lightweight concrete aggregate.
- Fibre and Bagasse Flour.
- Expansion joints and other accessories.

331 *Exhibit S–3—List of the Principal Materials Manufactured or Distributed by Certain-teed Products Corporation*

Boards:
- Insulation Board Products.
- Hardboard Products.
- Fibre Wallboard.

Roofing:
- Asphalt Shingles and Roll Roofings.
- Tarred and Asphalt Felts.
- Building Papers.
- Solid Asphalt.
- Roofing Pitch.
- Asphalt Roof Coatings and Cements.

Gypsum:
- Wall Plasters.
- Industrial Plasters.
- Acoustical Plasters.
- Crushed Gypsum Rock.
- Gypsum Lath.
- Gypsum Wallboards.
- Gypsum Sheathing.
- Gypsteel Plank.
- Gypsum Partition Tile.
- Masons' Lime.
- Finishing Lime.

332 *Exhibit S–4—List of the Principal Materials Distributed by Johns-Manville Sales Corp.*

Boards:
- Insulation Board Products.
- Hardboard Products.
- Asbestos Board Products.

Insulating Materials (other than boards):
- Rock Wool Insulation (loose, batts, and blanket).
- Asbestos Insulation.
- Acoustical and Sound Control Materials.

Roofing and Siding:
- Asphalt Shingles and Roll Roofings.
- Tarred and Asphalt Felts.
- Built-up Roofs.
- Building Papers.
- Roofing Cements, Coatings, and Accessories.
- Transite Sidings.

Flooring:
- Asphalt Flooring.

Industrial Products:
- Electrical Materials.
- Filter Aids and Filler Materials.
- Friction Materials.
- Refractory Products.
- Packings and Furnace Expansion Joints.
- Asbestos Textiles and Fibres.

333 *Exhibit S–5—List of the Principal Materials Manufactured or Distributed by Insulite Co.*

Boards:

Insulation Board Products.
Hardboard Products.
Fibre Wallboard.

Roofing:

Asbestos Shingles.
Roofing Papers.

Other Materials:

Rock Wool Insulation.
Imitation Brick Siding.
Sealer (paint).

334 *Exhibit S-6—List of the Principal Materials Manufactured or Distributed by Flintkote Co.*

Boards:

Insulation Board Products.
Hardboard Products.
Fibre Wallboard.

Insulating Materials (other than boards):

Rock Wool Insulation (loose and batts).
Minerals Granules.
Insulated Brick Siding.
Deadening Felts.
Insulating Papers.
Pipe Wrapping.

Roofing and Siding:

Asphalt Shingles and Roll Roofing.
Tarred and Asphalt Felts.
Asbestos Roofing and Siding Products.
Built-up Roofing.
Roof Saturants, Cements and Accessories.
Building Papers.

Industrial Products:

Road Construction Emulsions.
Rubber Cements and Dispersions.
Asphalt Emulsions and Cut-backs.
Paper products—chip-boards, containers, boxes, etc.
Spandrel Waterproofing Cloth.

335 *Exhibit S-7—List of the Principal Materials Manufactured or Distributed by National Gypsum Co.*

Boards:

Insulation Board Products.
Hardboard Products.

Insulating Materials (other than board):
Rock Wool (loose, batts and blanket).
Dry Fill Insulation.
Foil Insulation.
Acoustical Materials.

Gypsum Products:
Wall Plasters.
Industrial Plasters and Lime.
Acoustical Plasters.
Crushed Gypsum Rock.
Gypsum Lath.
Gypsum Wallboard.
Gypsum Sheathing.
Gypsum Partition Tile.
Masons Lime.
Finishing Lime.
Keen's Cement Products.

Miscellaneous Products:
Metal Lath.
Paint Products.

336 *Exhibit S-8—List of the Principal Materials Manufactured or Distributed by Wood Conversion Co.*

Boards:
Insulation Board Products.
Hardboard Products.
Fibre Wallboard.

Insulating Materials (other than board):
Balsam Wool Blanket and Sound Insulation System.

Miscellaneous Products:
Wood Mouldings—prefinished.
Metal Clips.
Building Papers.

337 *Exhibit S-9—List of the Principal Materials Manufactured or Distributed by Armstrong Cork Co.*

Boards:
Cork Board Building Materials.
Hardboard Products.
Fibre Wallboards.

Other Insulating Materials:
Loose Cork Insulation.
Cork Blocks.

Wall Coverings:
Linoleum for Walls.
Floor Coverings:
Linoleum.
Cork Flooring.
Industrial Products:
Bottle closures—various types.

338 *Exhibit S–10—List of Principal Materials Distributed by Dant & Russell, Inc.*

Boards:
Insulation Board Products.
Hardboard Products.
Fibre Wallboard.
Absorptive Concrete Form Liner.
Acoustical Interior Finish.
Plywood and Lumber:
Douglas Fir Plywood.
Spruce Plywood.
Western Hemlock Plywood.
Ponderosa Pine Plywood.
Philippine Mahogany Plywood.
Rough and Dressed Lumber.

339 *Exhibit S–11* File 2032–10.

OCTOBER 8, 1928.

Mr. B. G. DAHLBERG, *Pres.*,
Celotex Corporation, Michigan Avenue, Chicago, Ill.

DEAR SIR. This letter is written you at the suggestion of our clients, the Masonite Corporation of Wausau, Wis. and Laurel, Miss., in an entirely friendly spirit and in the hope of avoiding unnecessary litigation.

We have been informed that you are taking steps to put in equipment for making a product substantially the same as Masonite Presdwood, and which would infringe the Mason patents, especially No. 1,663,505, issued March 20, 1928.

We are writing you thus early and promptly after receiving this information to bring your attention to the fact that all the equipment, products and processes your representatives have seen on visits to the Masonite plant, and which involve novelty and invention are either already covered by issued patent or by pending applications which will mature into patents from time

to time, and that we have been instructed to develop and enforce the Masonite Corporation patent situation to the limit.

We trust that you will give this matter very serious attention before spending any money to duplicate any of the novel Masonite apparatus or products or carry out the processes in use by the Masonite Corporation.

In order to avoid any chance of misdelivery, we are sending out this letter by registered mail, return receipt requested.

340 It may be, of course, that our information is wrong, although it comes sufficiently direct to warrant bringing it to your attention. We would welcome an equally frank reply. The Masonite Corporation's U. S. patents, so far issued, include the following:

U. S. PATENTS OF THE MASONITE CORPORATION

No. 1,578,609, granted March 30, 1926, for Process and Apparatus for Disintegration of Wood and the Like.

No. 1,586,159, granted May 25, 1926, for Low Temperature Explosion Process of Disintegration of Wood and the Like.

No. 1,655,618, granted January 10, 1928, for Apparatus for and process of Explosion Fibration of Lignocellulose Material.

No. 1,663,503, granted March 20, 1928, for Process of Making Structural Insulating Boards of Exploded Lignocellulose Fibre.

No. 1,663,504, granted March 20, 1928, for Press Dried Structural Insulating Board and Process of Making Same.

No. 1,663,505, granted March 20, 1928, for Hard Grainless Fibre Products and Process of Making Same.

No. 1,663,506, granted March 20, 1928, for Integral Insulating Board with Hard Welded Surfaces.

Very truly yours,

HHD: P. DYKE, HOLDEN & SCHAINES.

341 *Exhibit S–12*

MASONITE CORPORATION

CHICAGO, ILL.

Warning!

Warning to infringers of patents of the Masonite Corporation, including patent No. 1,663,505, granted March 20, 1928, and others:

Masonite Presdwood is manufactured by the Masonite Corpora-

tion under various letters patent, including patent No. 1,663,505, granted March 20, 1928. This patent covers Presdwood or equivalent products, and the process of making same.

It has come to our attention that other manufacturers have declared their intention to produce and sell a board, which, we are advised by our patent counsel, is clearly an infringement of our patent rights.

We do not wish to unnecessarily disturb or trouble the building industry and building material dealers or manufacturers making use of artificial boards, but this warning is given to acquaint the industry with the fact that the Masonite Corporation will enforce its patent rights to the limit, and to bring to the attention of any and all makers, sellers and users of infringing boards the fact that they will be subject to suit in the United States Courts for injunction against further infringement and for an accounting of profits and damages.

MASONITE CORPORATION,
(Signed) BEN ALEXANDER, *President*.

342 *Exhibit S–13*

DARBY & DARBY

Chrysler Bldg., 405 Lexington Ave.

NEW YORK, N. Y.

Via registered mail.
Return receipt requested.

MAY 6, 1930.

MASONITE CORPORATION, *Chicago, Ill.*

GENTLEMEN. As attorneys for the Celotex Company it has come to our attention that you are engaging in competition with the Celotex Company in a manner which is not only unfair but illegal.

Your representatives have called on customers and prospective customers of The Celotex Company and made false and misleading representations to them. You have sent out circular notices obviously intended to intimidate the customers and prospective customers of The Celotex Company under patents which you assert you owned or controlled by you and which you assert are or may be infringed by hard board, such as manufactured by The Celotex Company.

Quite some time ago we advised you both in writing and orally that we considered your patents to be invalid and in any event not to be infringed by the hard board of The Celotex Company.

We furnished you at your request with samples of the
343 hard board manufactured by The Celotex Company. Since then, you have not directed any notice of infringement or charge of infringement to The Celotex Company or to us as attorneys for The Celotex Company, but on the contrary have attempted to intimidate the customers and prospective customers of The Celotex Company.

Our opinion of your patents has not changed and this is to advise you that if you differ with us on the question of the validity and infringement of your patents, you are aware that the main offices of The Celotex Company are located at No. 919 North Michigan Avenue, Chicago, Illinois, at which offices services may be obtained for the purpose of a suit filed in the United States District Court for the determination of the validity and of the question of our infringement of your patents. In any event, we demand that you cease forthwith your false and misleading representations to the customers and prospective customers of The Celotex Company as well as writen and oral attempted intimidation thereof and all other forms of unfair competition, that in the absence of judicial determination of the validity of your patents you refrain from any and every act of intimidation or annoyance of our customers and prospective customers, and, if you have any claim of any kind or nature whatsoever against The Celotex Company or its product, that you promptly assert such claim and stand the consequences.

Yours very truly,

(Signed) SAMUEL E. DARBY, JR.

344 *Exhibit S–18*

In the District Court of the United States for the District of Delaware

No. 871 In Equity

MASONITE CORPORATION, PLAINTIFF,

vs.

THE CELOTEX COMPANY, AND COLIN C. BELL AND HOBART P. YOUNG, RECEIVERS OF THE CELOTEX COMPANY, DEFENDANTS

And now, to-wit, this 1st day of December A. D. 1932, upon reading and considering the supplemental bill of complaint heretofore filed herein upon motion of Hugh M. Morris, Esquire, Solicitor for the Plaintiff, Caleb S. Layton, Solicitor for The Celotex Company and Colin C. Bell and Hobart P. Young, Re-

ceivers of this Court of and for The Celotex Company consenting thereto, it is

Ordered, adjudged and decreed that Colin C. Bell and Hobart P. Young, Receivers of this Court of and for The Celotex Company, be and they hereby are joined as parties defendant in the above entitled cause.

JOHN P. NIELDS.

345 *Exhibit S-19*

In the District Court of the United States for the Northern District of Illinois, Eastern Division

In Equity No. 11964

McMANUS, INCORPORATED, PLAINTIFF

vs.

CELOTEX COMPANY, DEFENDANT

ORDER AUTHORIZING HOBART P. YOUNG, ANCILLARY RECEIVER, TO ENTER INTO CERTAIN AGREEMENTS WITH THE MASONITE CORPORATION

This cause coming on to be heard on the petition of Hobart Young, Ancillary Receiver, The Celotex Company, dated October 9, 1933, and filed herein on October 10, 1933, praying for an order authorizing the making of certain agreements with The Masonite Corporation, and due notice having been served on all parties and the Court being fully advised in the premises.

It is hereby ordered and adjudged that the said Hobart P. Young, as Ancillary Receiver as aforesaid, is hereby authorized to execute and deliver to and with The Masonite Corporation the certain sales agreement in the form as substantially set forth in the copy of said agreement attached to said petition, marked Exhibit "A," and to carry out and perform said contract, and also said Receiver is authorized to settle the patent litiga-
346 tion with The Masonite Corporation as set forth in said petition and to this end to enter into such stipulations and agreements as may be necessary and proper.

Enter:

(Signed) JAMES H. WILKERSON.
District Judge.

Dated October 10, 1933.

347 *Exhibit S-20*

In the District Court of the United States for the District of Delaware

In Equity No. 981

MACMANUS, INCORPORATED, PLAINTIFF

vs.

THE CELOTEX COMPANY, DEFENDANT

ORDER

And now, to wit, this 12th day of October A. D., 1933, the foregoing petition of Colin C. Bell and Hobart P. Young, Receivers of The Celotex Company, having been presented and maturely considered,

It is ordered that the said Receivers be, and they are hereby, authorized to enter into the agreement of settlement of the litigation with the Masonite Corporation mentioned in said petition and the Order of the District Court of the United States for the Northern District of Illinois, Eastern Division, entered on the 10th day of October A. D. 1933, respecting the settlement of said litigation, is hereby ratified and confirmed; and the Receivers are further authorized to take such steps as may be necessary to cause the petition for the writ of certiorari to be withdrawn.

JOHN P. NIELDS, *D. J.*

348 *Exhibit S-21*

In the District Court of the United States for the District of Delaware

No. 871 in Equity

MASONITE CORPORATION, PLAINTIFF

vs.

THE CELOTEX COMPANY, AND COLIN C. BELL AND HOBART P. YOUNG, RECEIVERS OF THE CELOTEX COMPANY, DEFENDANTS

FINAL DECREE

And now, to wit, this Eighth day of December A. D. 1933, the mandate of the United States Circuit Court of Appeals for the Third Circuit, on the appeal of the plaintiff heretofore taken in the above-entitled cause, having been transmitted to the Clerk of this Court and filed herein on the Twentieth day of October A. D, 1933, wherein it was ordered, adjudged, and decreed

"* * * that the eight claims of the patent in suit are valid and claims 5, 6, 14, 16, 20, and 23 are infringed, and that, in consequence, the decree of the said District Court in this cause be, and the same is hereby reversed * * * except in so far as it dismissed the bill with respect to claims 22 and 26, with direction to the said District Court to reinstate the bill as to the six claims first named, and to take further proceedings thereon in accordance with the opinion of this Court * * *";

349 and the same having been brought to the attention of the Court, in compliance therewith it is now, upon motion of Hugh M. Morris, Esquire, solicitor and counsel for plaintiff,

Ordered, adjudged, and decreed by the court, as follows:

(1) That the decree of this Court, entered herein on the Second day of December A. D. 1932, dismissing the bill of complaint for want of equity, be and the same hereby is vacated and set aside, and the bill of complaint reinstated.

(2) That the plaintiff, Masonite Corporation, is the sole and exclusive owner of the entire right, title and interest in and to United States Letters Patent No. 1,663,505, issued March 20th, 1928, to William H. Mason, assignor to Mason Fibre Company (the plaintiff, as formerly named), for Hard Grainless Fiber Products and Process of Making Same.

(3) That the said Letters Patent No. 1,663,505, are good and valid in law as to claims 5, 6, 14, 16, 20, 22, 23, and 26 thereof.

(4) That the said William H. Mason was the first true and original inventor of the invention, described in said Letters Patent No. 1,663,505, and claimed in said claims 5, 6, 14, 16, 20, 22, 23, and 26.

(5) That the defendants, The Celotex Company, and Colin C. Bell and Hobart P. Young, Receivers of The Celotex Company, have infringed claims 5, 6, 14, 16, 20, and 23 of said Letters Patent No. 1,663,505, by using the process of said claims 14, 16, 20, and 23, and by making, using and selling the product of said claims 5 and 6.

350 (6) That upon application of plaintiff, a writ of injunction shall issue out of and under the seal of this Court, perpetually enjoining and restraining the defendants, The Celotex Company and Colin C. Bell and Hobart P. Young, as Receivers of said Celotex Company, and not individually, and each of them, their and each of their officers, agents, servants, employes, and attorneys, from directly, or indirectly infringing said Claims 5, 6, 14, 16, 20, and 23 of said Letters Patent.

(7) That, plaintiff by its approval of this decree appended hereto, having waived its right to an accounting for profits and damages and its right to recover its costs from the defendants,

no accounting be had, and that, each of the parties hereto pay and bear its own costs and expenses.

(8) That the principal and surety on the bond for costs of said appeal filed by plaintiff herein be discharged from any further obligation thereon.

JOHN P. NIELDS, *J.*

Approved as to form:

HUGH M. MORRIS,
Solicitor and counsel for plaintiff,
Wilmington, Delaware, December 8, 1933.

HENRY M. HUXLEY,
Counsel for defendants,
Chicago, Illinois, November 25, 1933.

C. S. LAYTON,
Solicitor for defendants,
Wilmington, Delaware, December 8, 1933.

Exhibit S–22A

MASONITE CORPORATION

[A DELAWARE CORPORATION]

Condensed Balance Sheet—August 31, 1933

ASSETS

Current Assets:		
Cash in Banks and on hand		$111,455.12
Receivables, less reserves		531,516.18
Inventories, certified by the management as to quantities and condition, valued at cost or market, whichever lower		656,689.64
Total current assets		$1,299,660.94
Prepaid Insurance, etc		35,144.45
Stock Purchase Agreements, Investments, etc. (Including 329 shares of treasury common stock at cost)		42,042.61
Plant and Equipment:		

Classification	*At cost value*	*Reserve for depreciation*	*Net value*
Land	$5,427.00		$5,427.00
Buildings, machinery, and equipment	2,503,777.48	$714,291.00	$1,789,486.48
Total	$2,509,204.48	$714,291.00	$1,794,913.48
Outlay for proposed construction (now deferred)			3,726.92
			1,798,640.40
Intangibles:			
Patents and patent development expenses, at cost, less amortization			$155,255.02
Flowage rights for sewerage disposal, less amortization			17,200.00
			172,455.02

LIABILITIES

Current Liabilities:		
Notes payable—bank	$20,000.00	
Trade creditors	46,150.33	$66,150.33
Accounts payable		86,034.16
Accrued wages, taxes, interest, etc		105,622.65
Current installment of 6% serial gold notes, due October 1, 1933 (see note below)		150,000.00
Total current liabilities		$407,807.14
Funded Debt:		
6% serial gold notes due October 1, 1933 to 1935, less current installment above		700,000.00
Capital Stock and Surplus:		
Capital stock—		
7% cumulative preferred stock—		
Authorized, 30,000 shares par value $100.00 each—Outstanding 13,477 shares	$1,347,700.00	
Common stock—		
Authorized 600,300 shares without par value—Outstanding, 266,689 shares (including treasury stock, per contra)	627,785.00	
Total	$1,975,485.00	
Earned surplus—		
Balance, August 31, 1932	$367,989.82	

Unamortized Note Discount and Expense	14, 829. 52	Net loss for current year	88,509.02	
		Balance, August 31, 1933	279,480.80	2, 254, 965. 80
		Contingent Liabilities Disclosed: Pending litigation—loss, if any, estimated nominal amount		
	$3, 362, 772. 94			$3, 362, 772. 94

[1] Dividends on preferred stock in arrears since September 1, 1931.

NOTE.—(1) The current installment ($150,000.00) of 6% serial gold notes was paid on October 2, 1933, and at that date a bank loan of $75,000.00 made, secured by assignment of $97,535.44 of accounts receivable; (2) Presdwood Concrete Forms Co, (a former subsidiary) did not operate during the year and was formally dissolved on November 12, 1932.

352 *Exhibit S–22B*

MASONITE CORPORATION

[A DELAWARE CORPORATION]

Condensed Profit and Loss Statement—Fiscal Year Ended August 31, 1933

Net sales	$1,669,782.15
Cost of sales	833,128.39
Gross profit on sales	$836,653.76
Expenses—	
Shipping	$41,866.77
Selling	650,731.96
Administrative and general	167,579.30
Total	$860,178.03
Net profit or (loss) from operations	23,524.27
Other income	70,321.93
Total profits and income	$47,097.66
Deduct—Interest paid and specific charges—	
Bond interest, etc	$51,276.10
Interest on loans	10,593.34
Bond discount and expense	10,472.67
Patent litigation expense	38,320.70
Loss on capital assets disposed of	17,859.40
Miscellaneous	7,084.47
Total	$135,606.68
Net loss before deducting operating loss of subsidiary	$88,509.02
Add—Operating loss of subsidiary	
Net loss, carried to surplus account	$88,509.02

352–A *Exhibit S–23*

AGENCY AGREEMENT AND LICENSE OPTION

This Memorandum of Agreement made this 10th day of October 1933, by and between Masonite Corporation, a Delaware Corporation, having its principal sales office at Chicago, Illinois (hereinafter called the Manufacturer) and Hobart P. Young, duly appointed Receiver of The Celotex Company, a Delaware Corporation, under the certain order of the District Court of the United States for the Northern District of Illinois, Eastern Division, entered June 17, 1932, acting as such Receiver and not personally, having a principal business office at Chicago, Illinois (hereinafter called the Agent), witnesseth:

1. The Manufacturer owns the United States Letters Patent and Applications for Letters Patent shown on Schedule 1 attached hereto under which it is manufacturing and selling hardboard

products which the Agent is desirous of selling, the validity of which Letters Patent is expressly acknowledged by the Agent so long as this agreement shall remain in force, but such acknowledgment of validity shall extend only to the use of said inventions with respect to hardboard products.

For the purpose hereof, hardboard products shall be deemed to be those products covered by or made under the processes of said patents or applications for patents or any of them having a density in excess of twenty-five (25) pounds per cubic foot and having as their major constituent wood or woody fibers and being a homogeneous, hard, dense, and grainless material; said products are hereinafter referred to as hardboards or as hardboard products.

2. The Manufacturer hereby appoints said Agent as a *del credere* factor and hereby authorizes said Agent and licenses it under said Letters Patent to sell the said hardboard products manufactured by said Manufacturer as covered in Section 4 hereof throughout the Continental United States and Hawaii on the terms, prices and conditions hereinafter more particularly stated.

3. The Agent agrees to promote the sale of hardboards manufactured by the Manufacturer, but nothing herein contained shall be construed as requiring it to use any greater degree of diligence than shall be determined to be reasonable by the Agent.

4. The Manufacturer agrees to manufacture such of its products as are shown on the Exhibit A, attached hereto, in the standard sizes therein shown, in such quantities as may be reasonably required by the Agent to enable it to fill its orders; and to promptly ship on orders and specifications from the Agent to any place within the Continental United States or Hawaii, at its list then currently in effect. In event the Manufacturer shall during the life of this agreement manufacture and sell other hardboard products under said Letters Patent, or any of them, the Manufacturer shall notify the Agent thereof, together with prices, discounts, etc., and the Agent shall have the right to have such products included with the products listed in said Exhibit A, and to have such products available to the Agent with commissions fairly comparable to those herein specifically set out.

5. The Manufacturer shall from time to time designate the minimum selling price and maximum terms and conditions of sale at which the Agent shall sell Manufacturer's products hereunder, except as provided in Section 10 hereof.

The right to change the list prices and terms of sale is vested solely in the Manufacturer, but the Manufacturer agrees that the list prices and terms of sale from time to time in effect shall be the minimum prices and maximum terms of sale at which it is either offering to or actually making sales to its respective classes of customers and that it will not depart therefrom excepting after

proper notice to Agent as elsewhere herein provided. The Manufacturer shall give to the Agent not less than ten (10) days' notice of any change in the minimum selling price or terms or conditions of sale previously designated by the Manufacturer.

In event of change in the selling price or terms or conditions of sale, the new prices or terms shall take effect and shall apply to all shipments made ten (10) days after the giving of notice by the Manufacturer to the Agent, excepting only *bona fide* orders actually received and accepted by the Agent before receipt of such notice and ordered shipped by the Agent within thirty (30) days after receipt of such notice. All notices of change in selling price or terms or conditions of sale shall be given by the Manufacturer to the Agent by telegraph at the close of the business day, and the Manufacturer agrees not to release the same to its own sales organization or customers prior to the opening of business on the day following the sending of the notice.

6. In event the Agent shall make sales of hardboard hereunder at prices less than the minimum price, or on terms or conditions of sale more favorable than those designated by the Manufacturer, except as provided in Section 10 hereof, the Agent shall pay to the Manufacturer in respect of such sales so made the amount due to the Manufacturer for the sales price of such product as provided by the price list then in effect plus liquidated damages in the amount of Ten Dollars ($10) per 1,000 square feet. The payment of such sum in respect of any such sales shall not deprive the Manufacturer of its right of canceling this agreement for cause.

If the Agent unintentionally violates this agreement in the manner set forth in this section, as, for example, by a bona fide error of calculation, or the like, then the Agent shall pay to the Manufacturer in respect of such sales so made the amount due the Manufacturer on the sales price of such products as provided by the price list then in effect plus the difference between the price or terms of sale at which the hardboard products were actually sold and the price list or terms of sale thereof, and the Manufacturer shall have no right to cancel this agreement on account of such unintentional violation. If the Manufacturer does not agree that such violation was unintentional, the Agent shall have the right to have the question referred to arbitration, as provided in Section 20 hereof, and the burden shall be on the Agent to prove that the violation was unintentional.

7. The Manufacturer agrees to ship hardboards in accordance with the orders and specifications of the Agent. Said Agent agrees that on direct shipments to the Agent said hard boards shall be received and held on consignment, and that the title thereto shall remain in the Manufacturer until sold by the Agent.

8. The Agent agrees to compensate the Manufacturer as fol-

lows: One-half of the difference between the list price thereof and the Agent's discount thereon shall be advanced by the Agent within twenty (20) days after the close of the Calendar month in which the order is shipped by the Manufacturer, and the balance thereof shall be paid within twenty (20) days after the close of the calendar month in which such shipment is made of hardboard products sold by the Agent to its customers. In event the Agent directs the Manufacturer to ship goods directly to its customers, the Agent shall pay the entire amount due the Manufacturer within twenty (20) days from the close of the calendar month in which the product is shipped. A shipment of a "long" as hereinafter defined shall be considered a shipment of a full board and shall be reported and paid for accordingly by the Agent to the Manufacturer.

It is understood and agreed that the minimum prices of the products stated in said price list and which are to be observed by the Agent are F. O. B. cars, Manufacturer's factory, and that the Agent is responsible for and shall pay to or indemnify the Manufacturer for all necessary freight or transportation costs, together with all sales or similar taxes, excises and charges which are now or hereafter may be directly levied, imposed or charged (whether by Federal, State, Municipal, or other public authority) in respect of the sale of products sold and distributed by the Agent hereunder. The Agent shall make all reports required by public authorities in respect of such sales. When authorized by law imposing any sales or similar tax, excise or charge, the same shall be reflected in the price and properly stated in the price list.

The Agent agrees, at its own expense, to carry adequate insurance against usual hazards covering all products consigned to it, and all policies shall, if required by the Manufacturer, be payable to the Agent and to the Manufacturer as their respective interests may appear.

9. The parties hereto agree that the Agent's compensation shall be by way of commission on each sale of products sold (excluding sales or similar taxes if any) and shall be computed on the basis of the following schedule, the footage to be determined upon the total aggregate footage of all products sold during the year:

	First bracket up to 5,000,000 sq. ft.	Second bracket over 5,000,000 up to 10,000,000 sq. ft.	Third bracket over 10,000,000 up to 15,000,000 sq. ft.	Fourth bracket over 15,000,000 up to 20,000,000 sq. ft.	Fifth bracket over 20,000,000 sq. ft.
¼" Presdwood	45%	46%	48%	49%	50%
Presdwood over ¼", Quartrboard, De Luxe Quartrboard, and Temprtile	35%	36%	38%	39%	40%

The Agent shall be entitled to be paid currently by way of commission at the minimum rate shown in the first bracket and the Manufacturer shall as soon as practicable after the close of each year pay to the Agent such sum as will make the Agent's compensation for that year the flat rate as shown in the bracket in which the Agent's yearly sales shall fall.

On all sales of Tempered boards and on hardboards wrapped by Manufacturer the commission shall be the Agent's commission (as provided in this section) on the sale of the particular hardboard sold plus ten percent (10%) of the additional charge or charges made in accordance with the minimum selling price list for the Tempered and/or wrapped products. On hardboard wrapped by Agent, Agent shall be entitled to retain said wrapping charge.

(This paragraph omitted pursuant to Rule 580 of the Rules and Regulations of the Securities and Exchange Commission under the Securities Act of 1933, as amended.)

10. The Manufacturer shall not be obligated to manufacture or ship any hardboard in a size more than 12' by 4' (with or without saw kerf allowance, and trimmed or untrimmed, as may be designated by Agent), or in thickness less than 1/8" or greater than 5/16", except that if Manufacturer offers for sale or sells any hardboard product of sizes or thickness other than as elsewhere herein specifically provided and not covered in the minimum selling price list, then Manufacturer shall be obligated to include such product in its appropriate minimum price list and to make such product available to Agent with commissions fairly comparable to those herein specifically set out.

The Manufacturer will, if indicated by the Agent at the time of placing the order, cut each board into not more than two pieces. Any piece 5 feet long or longer shall be styled a "long," and any piece shorter than 5 feet shall be styled a "short." The prices at which the Agent may make sales of full boards or "longs" are to be covered by the current price lists aforesaid, and the prices at which the Agent may sell "shorts" are likewise to be covered by said lists, when sold to classes of trade to which the Agent may sell "longs" as hereinafter provided. To other classes of trade, Agent may sell "shorts" at prices to be determined by Agent.

The Agent shall not be permitted to make sales of "longs" to any person other than dealers and to the various branches of the United States Government, except that such sales may be made to wholesalers, jobbers, and regularly established selling agents of Agent. Upon request of Manufacturer, the Agent shall supply the Manufacturer with copies of contracts (except current orders) made with the excepted classes as above defined.

For the purpose of this agreement, a dealer is defined as being

any person, firm or corporation who maintains an adequate plant or plants equipped for service to the public with office, storage yard and warehouse kept open during business hours, a sales service, and carries a sufficient stock of Insulation Industry Products and/or other building materials, for the purpose of selling at retail, to supply the normal requirements of the community.

11. If the Agent or its customers so desire, the Manufacturer will, without extra cost, brand or mark all hard boards with such Agent's or customer's name or trade mark or other indicia as may be reasonably requested by the Agent. The Agent expressly agrees that it will not use the trade-names "Masonite" or any of the trade-marks of the Manufacturer, including the trade-names "Presdwood," "Quartrboard," "Temprtile," and "Tempered Presdwood," but nothing herein shall prevent Agent's designation of Tempered board by the use of the word "tempered."

12. The Manufacturer reserves the right to mark all products sold by the Agent with such patent notice as it may be advised by counsel is necessary for its protection, but no such marking shall in any manner deface the said products nor in any manner differ from the method used by Manufacturer in so marking said products marketed to its own trade by Manufacturer.

13. The Manufacturer agrees that all products which may be manufactured and shipped by it on order of the Agent shall be good, workmanlike products of a character and quality equal to that currently manufactured by it and sold to its customers. The Manufacturer's liability shall be limited to replacing delivered to Agent or its customers, without cost to the Agent, any defective material when the defect is one of manufacture.

14. The Agent agrees to report on or before the twentieth day following the close of each calendar month to the Manufacturer on forms furnished by the Manufacturer, giving an inventory of all products consigned to the Agent and on hand and unsold at the end of said month in such detail as may reasonably be requested by the Manufacturer.

15. In the event the Agent shall fail or refuse to keep or perform any of the conditions or agreements on its part to be kept and performed, then the Manufacturer shall have the right and option to terminate this agreement by serving written notice of its intention so to do, which notice shall state the default or defaults for which the license is to be terminated. If within thirty (30) days after receipt of said notice, the Agent shall not have cured said defaults said cancellation shall become absolute, otherwise it shall be deemed to have been withdrawn. The Manufacturer shall also have the right of cancelling this agreement at any time by written notice in the event the Agent shall fail to have ordered from the Manufacturer at least one and a half

million (1,500,000) square feet of hard board products for any six months' period or if the Agent shall hereafter be adjudicated bankrupt or insolvent or a receiver shall be appointed therefor.

The Agent shall have the right of cancelling this agreement by six months' notice in writing to the Manufacturer.

In event of termination of this agreement for any reason, the Agent shall fully comply up to the date of the termination period and shall at said time purchase and pay for all products consigned to it and unsold, or at the option of the Manufacturer shall return all or so much thereof as it may request. On all goods returned, the Manufacturer shall refund to the Agent all advances made by the Agent to or for the account of the Manufacturer in respect of such goods, including freight and reasonable handling charges.

16. The Manufacturer shall not be liable for failure to deliver or delays in deliveries caused by strikes, riots, lock-outs, car shortages, fire, floods, storms, and other acts beyond its control.

The Manufacturer shall not be required to accept orders or deliver hard board products in excess of its manufacturing capacity, it being understood and agreed that the Manufacturer is selling hard board products on its own account as well as through the Agent and other Agents.

In event orders are received in excess of Manufacturer's plant capacity, or any one or more of its several products, it will pro rate among all sales of such product or products, including therein its direct sales, any necessary reductions, on the basis of the sales volume for the preceding six months' period of such product or products.

17. The Manufacturer agrees that at any time while the Agent is in good standing hereunder, it will at the request of the Agent issue to the Agent a license to manufacture and sell hard boards under the Letters Patent aforesaid substantially in the form annexed hereto and marked Exhibit B, provided, however, that the down payment for such license shall be made according to the following schedule:

If the license is issued—

before December 31, 1934	$200,000.00
before December 31, 1935	175,000.00
before December 31, 1936	150,000.00
before December 31, 1937	125,000.00
before December 31, 1938	100,000.00
before December 31, 1939	75,000.00
before December 31, 1940	50,000.00
if issued thereafter	50,000.00

18. The Manufacturer shall have the right from time to time and at any reasonable time, through a firm of certified public accountants, to inspect and examine the physical inventory and

books and records of the Agent relating to any of the transactions or matters which are the subject of this agreement, but such accountants shall not divulge to the Manufacturer any confidential or commercial information.

19. The Manufacturer hereby warrants that none of the hard boards covered by this agreement, when used for the general purposes for which such hardboards are customarily designed or intended, infringes or will infringe any Letters Patent owned by others than the parties hereto, and agrees to save harmless and protect the Agent, as well as the customers secured by the Agent, against any claim or demand based upon such alleged infringement, and, upon notice, agrees to appear and defend at its own expense any and all suits at law or in equity arising from such alleged infringement, conditioned that the Manufacturer shall have full control of the defense of such suits.

It is further agreed that if it be finally adjudicated that any Letters Patent or claim thereof is valid, and any of the hard boards covered by this agreement constitute an infringement thereof or of any of the valid claims thereof, so as to impair the commercial production thereof by the Manufacturer, then in any such events this agreement insofar as it applies to such hard board products as should be covered by such Letters Patent or claims thereof so held to be valid and infringed shall be cancelled or suspended.

20. All disputes and differences arising out of this agreement shall be settled and finally determined in the City of Chicago, Illinois, by arbitration in the following manner: Each party to this agreement shall appoint an arbitrator. If the two arbitrators so appointed cannot agree within a month after their appointment, they will select a third arbitrator. The decision in writing of the three arbitrators, or any two of them, shall be final and binding upon the parties hereto, who shall conform to and abide by said decision. If either party fails to appoint its arbitrator within fourteen (14) days after notice in writing requiring it so to do, the arbitrator appointed by the other party shall act for both; his decision in writing shall be final and binding upon both parties, as if he had been appointed by consent, and both parties thereto shall conform to and comply therewith.

21. Sales of hard boards covered by this agreement made by any subsidiary, affiliated, or controlled company now or hereafter organized, owned, affiliated, or controlled by or with the Agent, shall be deemed to be sales made by such Agent for the purpose of this agreement. The Agent may reconsign products of the Manufacturer to sub-agents with the approval of the Manufacturer on condition that title to said products shall remain in the

Manufacturer and the sub-agent shall conform to all the sales terms and sales conditions of this agreement.

22. This agreement is not assignable by the Agent without the written consent of the Manufacturer, except that this agreement and the rights thereunder may be assigned to a person, firm or corporation acquiring all or substantially all of the assets and business of the Agent, and which assignee shall in writing assume all the obligations of the Agent under this agreement.

23. This agreement shall continue during the life of that one of the Letters Patent or applications for Letters Patent aforesaid having the longest term to run, including any reissues, extensions or improvements thereof, unless sooner terminated by Act of either party.

In witness whereof, the Agent has affixed his signature hereto and the Manufacturer has caused its corporate name to be signed by its duly authorized officer the day and year first above written.

(Signed) HOBART P. YOUNG,
as Receiver for The Celotex Company.
MASONITE CORPORATION,
By (Signed) JAMES P. GILLIES.

EXHIBIT A—MASONITE DEALER PRICES

	M sq. ft.	
Presdwood:		
1/8" untempered	$40.00	4' x 12' and 4' x 6'
1/8" untempered	$44.00	4' x 8'—4' x 9'—4' x 10'
Tempered: $10.00 higher.		
5/32" untempered	$52.00	4' x 12' and 4' x 6'
5/32" untempered	$56.00	4' x 8'—4' x 9'—4' x 10'
Tempered: $10.00 higher.		
1/4" untempered	$75.00	All 4' x 12'.
Tempered: $10.00 higher.		
5/16" untempered	$100.00	All 4' x 12'
Tempered: $10.00 higher.		
Wrapping: $1.00 extra.		
Quartrboard:		
Quartrboard	$30.00	4' x 12' and 4' x 6'
Quartrboard	$32.00	4' x 8'—4' x 9'—4' x 10'
De Luxe Quartrboard	$40.00	4' x 12' and 4' x 6'
De Luxe Quartrboard	$44.00	4' x 8'—4' x 9'—4' x 10'
Presdwood shorts:		
1/8" B & B	$30.00	1' x 4'—2' x 4'—3' x 4'—4' x 4'
5/32" B & B	$45.00	1' x 4'—2' x 4'—3' x 4'—4' x 4'
Tempered: $10.00 per M sq. ft. higher in each case.		
Wrapping: $1.00 per M sq. ft. extra.		
Temprtile:		
1/8" Temprtile	$70.00	All 4' x 12'
5/32" Temprtile	$90.00	All 4' x 12'

Schedule 1—Issued Patents and Applications

Patent No.	Date	Title and subject matter
1,578,609	3/30/26	"Process and Apparatus for Disintegration of Wood and the Like." The original explosion patent.
1,655,618	1/10/28	"Apparatus for and Process of Explosion Fibration of Lignocellulose Material." Covers the gun battery.
1,663,504	3/20/28	"Press-Dried Structural Insulating Board and Process of Making Same." "Quartr-board."
1,663,505	3/20/28	"Hard Grainless Fiber Products and Process of Making Same." "Presdwood."
1,663,506	3/20/28	"Integral Insulating Board with Hard Welded Surfaces."
1,767,539	6/24/30	"Process of Making Composition Boards and the Like and Apparatus Therefor." Thirty-three claim patent covering the manufacture of hardboard apparatus mainly.
1,784,993	12/16/30	"Water Resistant Fiber Product and Process of Manufacture." Incorporating size in the water bath.
1,812,969	7/7/31	"Process of Making Integral Insulating Board with Hard Welded Surfaces." Divisional of patent No. 1,663,506, covering the process.
1,824,221	9/22/31	"Process and Apparatus for Disintegration of Fibrous Material." Improvements on original explosion patent (1,578,609).
1,844,861	2/9/32	"Process for the Manufacture of Vegetagle Fiber Products," Improvements on Presdwood patent covering structural features.
1,844,921	2/9/32	"Production of Hard Dense Bodies of Vegetable Fiber." Covers frosted surface press platen.
1,849,307	3/15/32	"Press Loader."
1,903,222	3/28/33	"Presses." Covers movable screen in press.
1,923,105	8/22/33	"Process for Production of Non-Warping Fiber Boards." Humidifier process.
1,923,106	8/22/33	"Apparatus for Production of Non-Warping Fiber Boards." Division of 1,923,-105. Covers humidifier apparatus.

1,923,548	8/22/33	"Article Handling System." Division of 1,767,539, the thirty-three claim patent.
1,923,549	8/22/33	"Article Handling System." Second division of thirty-three claim patent.
1,924,162	8/29/33	"Cut-off Machine."

PATENTS OWNED BY MASONITE CORPORATION

Patent No.	Date	Title
1,383,370	7/5/21	Process of Splitting Mica (Bancroft).
1,485,894	3/4/24	Apparatus for Manufacturing Pulp Articles (Sutherland).
1,506,789	9/2/24	Apparatus for Drying Pulp Products (Sutherland).
1,548,135	8/4/25	Refining Engine (Gamble).

Pending Applications

Serial No.	Date	Title and Subject Matter
611,431	5/14/32	"Vegetable Fiber Products and Process of Making Same." Double Pressing operations.
612,072	5/18/32	"Hard Vegetable Fiber Products of High Strength and Process of Making Same." Tempering of Presdwood. Case allowed.

EXHIBIT B—LICENSE

This Memorandum of Agreement made this _____ day of _____, 19__, by and between Masonite Corporation, a Delaware Corporation, having its principal sales office at Chicago, Illinois (hereinafter called the Licensor) and _____ _____ _____ having a principal business office at _____, _____ (hereinafter called the Licensee), witnesseth:

The Licensor owns the United States Letters Patent and patent applications listed in the schedule hereunto annexed and marked Schedule 1 under which it is manufacturing and selling homogeneous pressed hard board products, and which the Licensee is desirous of manufacturing and selling, under a non-exclusive license.

Now, therefore, the parties do agree as follows:

1. The Licensor hereby grants to Licensee a non-exclusive license to manufacture and sell hard board products (hereinafter defined) under the Letters Patent and applications listed in said Schedule 1 throughout the Continental United States and Hawaii.

For the purposes hereof, hard board products shall be deemed to be those products covered by or made under the processes of said patents or patent applications or any of them having a density in excess of twenty-five (25) pounds per cubic foot and having as their major constituent wood or woody fibers and being a homogeneous, hard, dense and grainless material; said products hereinafter referred to as hard boards or as hard board products.

2. The Licensor further licenses said Licensee under any and all patents which it may hereafter acquire, own or control or have the right to grant licenses under, and which cover improvements on said hard board products or the processes of manufacturing, or machines or processes for the manufacture thereof. The Licensor shall from time to time designate the minimum selling price and maximum terms and conditions of sale to dealers and for industrial purposes at which the Licensee may sell said hard boards. The Licensor agrees to give to the Licensee not less than ten days notice of any change in minimum selling price or terms and conditions of sale previously designated by Licensor. All notices of change in selling price or terms or conditions of sale shall be given by the Licensor to the Licensee by telegraph at the close of the business day, and the Licensor agrees not to release the same to its own sales organization or customers prior to the opening of business on the day following the sending of the notice.

3. In the event the Licensee shall make sales of hard board hereunder at prices less than the minimum price, or on terms or conditions of sale more favorable than those designated by the Licensor, the Licensee shall pay to the Licensor in respect of such sales so made the amount due to the Licensor for the sale price of such product as provided by the list prices then in effect plus liquidated damages in the amount of Ten Dollars ($10) per 1,000 square feet. The payment of such sum in respect of any such sales shall not deprive the Licensor of its right of cancelling the agreement for cause.

If the Licensee unintentionally violates this agreement in the manner set forth in this section, as, for example, by a bona fide error of calculation, or the like, then the Licensee shall pay to the Licensor the difference between the price at which the hard board products were actually sold and the list price thereof, and the Licensor shall have no right to cancel this agreement on account of such unintentional violation. If the Licensor does not agree that such violation was unintentional, the Licensee shall have the right to have the question referred to arbitration, as provided in Section 17 hereof, and the burden shall be on the Licensee to prove that the violation was unintentional.

4. The right to change the list prices and terms of sale and the differential between hard board sold to dealers (including the various branches of the United States Government) and that sold for industrial purposes is vested solely in the Licensor, but the Licensor agrees that the list prices and terms from time to time in effect shall be the prices and terms at which it is either offering to or actually making sales to its respective classes of trade, and that it will not depart therefrom to the detriment of the Licensee. Licensor shall likewise, subject to the same conditions set list prices and terms covering sale of hard board to wholesalers, jobbers and regularly established selling agents of Licensee, to which class the sales shall be made at special list prices and terms. Upon request by Licensor, the Licensee shall supply the Licensor with copies of contracts (except current orders) made with any such wholesalers, jobbers or regularly established selling agents of Licensee. For the purpose of this contract, a dealer is defined as being any person, firm or corporation who maintains an adequate plant or plants, equipped for service to the public with office, storage yards and warehouses kept open during business hours, a sales service, and carries a sufficient stock of Insulation Industry Products and/or other building materials, for the purpose of selling at retail, to supply the normal requirements of the community.

Licensee agrees to pay Licensor on the 25th day following the close of each calendar month for all hard boards manufactured by it during said month under the said patents or any of them, a royalty of ten (10) percentum on the then F. O. B. plant current list price of hard boards as then in effect by the Licensor. The royalty shall be the same upon all hard boards of 4′ x 12′ or less. Licensee shall have no right to sell boards of larger area without the express consent of the Licensor and on a royalty rate to be agreed upon.

6. If, in any year, the royalties paid by the Licensee shall be less than $50,000, it shall within forty days after the end of said year, pay any such deficiency over to the Licensor. The Licensee agrees to report to the Licensor (under oath if requested) on or before the 25th day following close of each calendar month, on forms furnished by the Licensor, giving amount of hard boards manufactured during the preceding calendar month.

The Licensee agrees to keep proper books of account and the Licensor shall have the right from time to time, at any reasonable time, through a firm of certified public accountants, of inspecting and examining the physical inventory and books and records of the Licensee, relating to any of the transactions or matters which are the subject of this license, but such account-

ants shall not divulge to the Licensor any confidential or commercial information.

7. It is understood and agreed that the license hereby granted shall be personal to the Licensee and to such of its subsidiaries in which it may own and control a majority of the voting stock, and that neither said license nor any right thereunder or hereunder shall be sold, assigned, or transferred by the Licensee without written consent of the Licensor, excepting to a corporation which may acquire all or substantially all of the assets and business of the Licensee, and which corporation shall in writing assume all of the obligations of the Licensee under this agreement.

8. The Licensee agrees that all of said hard board products embodying the inventions and improvements set forth and claimed in said patents and applications, or the package in which the same is shipped by the Licensee, shall be distinctly marked with the word "Patent" or the words "Patent Applied For" as the case may be, together with the number of any such patents or applications specified by the Licensor, the claims of or under which may be embodied in said hard board, and in connection with said marking the Licensee will further mark said board or the package in which the same is shipped by the Licensee with the words "Licensed Under the Above Letters Patent" or "Licensed Under Pending Applications for Letters Patent" as the case may be.

9. As one of the considerations for the license and privilege hereby granted, Licensee agrees that it does, and, so long as this license agreement shall continue in force, will continue to admit the validity of each and every of the Letters Patent or which may be issued on the applications for Letters Patent listed in Schedule 1 and of patents for improvements but such acknowledgment of validity shall extend only to the use of said inventions with respect to hard board products; that it will not, within the scope of the above limitation, at any time during the existence of said license, directly or indirectly by itself or through or together with another or others, contest the validity of either or any of said Letters Patent, or the scope of the claims thereof or thereunder, or the title of the Licensor thereto.

10. The Licensor hereby warrants that none of the hardboard products covered by this agreement, when used for the general purpose for which hardboard products are customarily designed or intended, infringes or will infringe any Letters Patent owned by others than the parties hereto, and agrees to save harmless and protect the Licensee, as well as the customers secured by the Licensee, against any claim or demand based upon such alleged infringement, and upon notice, agrees to appear and defend at

its own expense any and all suits at law or in equity arising from such alleged infringement conditioned that Licensor shall have full control of the defense of such suits.

It is further agreed that if it be finally adjudicated that any patent or claim thereof is valid, and any of the hardboards covered by this license agreement constitute an infringement thereof or any of the valid claims thereof so as to impair the commercial production thereof by Licensee, then in any such event this agreement insofar as it applies to such hardboard products as should be covered by such patents or claims thereof so held to be valid and infringed shall be cancelled or suspended.

11. The Licensor agrees to afford reasonable patent protection and to that end to diligently prosecute infringements of the said Letters Patent scheduled in said Schedule 1 or any that may be granted for improvements to the end that such infringers may be enjoined from manufacturing and selling homogeneous pressed hardboards embodying the inventions and improvements so forth in said Letters Patent or any of them.

In case in any suit upon any of said letters patent it shall be finally adjudicated that the process, product or machine therein complained of as an infringement of any of said Letters Patent, is not an infringement thereof, or that the manufacture, use or sale thereof by any party to such suit, other than the Licensor, cannot be enjoined, then the Licensee shall be permitted thereafter to manufacture, use and/or sell (as appropriate) such process, product, or machine free from the restrictions of this agreement and without payment thereunder of any license fees or royalties therefor insofar as said patent is concerned. It is understood that the provisions of this paragraph shall not be effective so long as Masonite shall in good faith continue to litigate the question of validity and/or infringement of said patent.

12. In event the Licensor shall grant any license to any other person, firm or corporation under the patents and applications aforesaid or any of them on terms or with provisions more favorable than herein granted to the Licensee, the Licensee shall be entitled to have the benefit of such more favorable terms or provisions.

13. The Licensor will, upon request of the Licensee, furnish the Licensee with cooperation, advice and counsel to assist the Licensee in making its plant or plants ready for the manufacture of hardboards embodying the inventions and improvements set forth and claimed in said Letters Patent and applications for Letters Patent, and will, upon request, furnish to the Licensee the advice and instructions of the Licensor's experts, together with such information as it possesses in respect of the purchase

and cost of machines and appliances used in the manufacture of said hardboard products. In the event the Licensee shall so request and shall pay or agree to pay to the Licensor such reasonable attendant expenses for such services as Licensee may request, the Licensor then agrees to send its experts to the plant or plants of the Licensee to assist and instruct the Licensee or its agents or employees in the practical operation of such plant or plants.

14. The Licensor agrees to disclose to the Licensee promptly all information and formulas which it now has relating to the process of making hardboards or of machines or processes for making the same as set forth and claimed in said patents and applications for patents set forth in Schedule 1, together with a description of the machines or appliances which it now utilizes in the manufacture of said board.

The Licensee agrees to disclose to the Licensor promptly all information which it now has or may hereafter from time to time acquire relating to improvements in hardboard products, as defined herein, the processes, or machines for making the same, and when requested by the Licensor to file patent applications therefor in such countries as the Licensor may designate, and to assign an undivided half interest therein to the Licensor, one-half the cost and expense thereof to be borne by the Licensor.

15. The Licensee expressly agrees that it will not use the trade name "Masonite" or any name similar thereto, nor any of the trade-marks of the Licensor, including the trade names "Presdwood," "Quartrboard," "Temprtile" and "Tempered Presdwood," but nothing herein shall prevent Agent's designation of Tempered board by the use of the word "tempered,"

16. In event the Licensee shall fail or refuse to keep or perform any of the conditions or agreements on its part to be kept and performed, then the Licensor shall have the right and option to terminate this agreement by serving written notice of its intention so to do, which notice shall state the default or defaults for which the license is to be terminated. If within ninety (90) days after the receipt of said notice, the Licensee shall not have cured said defaults, said cancellation shall become absolute, but if within said ninety (90) day period the default or defaults complained of shall have been cured, then such notice shall be deemed withdrawn. In the event that the Licensee shall hereafter be adjudicated bankrupt or insolvent or a Receiver shall be appointed therefor, the Licensor reserves the right to cancel this contract. The term Licensee shall include any of its subsidiaries as defined in paragraph 7 hereof.

Cancellation shall not relieve the Licensee from any liability

accrued up to the time of the termination of this license agreement.

17. All disputes and differences arising out of this contract shall be settled and finally determined in the City of Chicago, Illinois, by arbitration in the following manner: Each party to this agreement shall appoint an arbitrator. If the two arbitrators so appointed cannot agree within a month after their appointment, they will select a third arbitrator. The decision in writing of the three arbitrators or any of two of them, shall be final and binding upon the parties hereto, who shall conform to and abide by said decision. If either party fails to appoint its arbitrator within 14 days after notice in writing requiring it so to do, the arbitrator appointed by the other party shall act for both; his decision in writing shall be final and binding upon both parties, as if he had been appointed by consent, and both parties thereto shall conform to and comply therewith.

18. This license shall continue in force during the life of that one of the said patents having the longest term to run and/or applications and/or patents for improvements including all reissues, renewals, extensions, and improvements thereof, unless sooner terminated by the act of either party.

In witness whereof, the Licensee has affixed his signature hereto and the Licensor has caused its corporate name to be signed by its duly authorized officer the day and year first above written.

MASONITE CORPORATION.

By ——— ———

AGENCY AGREEMENT AND LICENSE OPTION

Masonite Corporation to ----------

Date --------

352-B *Exhibit S-24*

SUPPLEMENTAL AGREEMENT

This Memorandum of Agreement made this 10th day of October 1933, by and between Masonite Corporation, a Delaware Corporation, having its principal sales office at Chicago, Illinois hereinafter called "Masonite," and Hobart P. Young, duly appointed Receiver of The Celotex Company, a Delaware Corporation, under the certain order of the District Court of the United States for the Northern District of Illinois, Eastern Division,

entered June 17, 1932, acting as such Receiver and not personally, hereinafter called "Celotex," witnesseth:

Whereas, there is pending between the parties hereto an infringement suit based on United States Letters Patent 1,663,505, and;

Whereas, it is the desire of the parties to terminate said litigation in consideration of an agency agreement and license option (hereinafter referred to as agency agreement) between the parties hereto dated on October 10th, 1933;

Now, therefore, the parties agree as follows:

1. Celotex shall withdraw its pending petition for Writ of Certiorari heretofore filed in the Supreme Court of the United States in the case of The Celotex Company et al. vs. Masonite Corporation.

2. Each of the parties shall pay, and bear its own costs and expenses incurred in said litigation on said patent 1,663,505.

3. Masonite waives an accounting in connection with the said infringement suit and waives all claims for profits and damages for past infringement of its patents by Celotex or its customers.

4. In the event that Masonite shall make any agency agreement with respect to the sale of all or any of its hardboard products, as defined in the said Agency Agreement, on terms or with provisions more favorable to the Agent than granted to Celotex in said Agency Agreement, then Celotex shall be entitled to have the benefit of such more favorable terms or provisions. The making by Masonite of freight allowances to partially off-set geographical inequalities or the making of temporary concessions necessary to the settlement of litigation shall not be deemed to be provisions more favorable to the Agent, Masonite agrees to promptly supply Celotex with copies of all such Agency Agreements. In event of any dispute arising between the parties as to the application of this Paragraph 4, the same shall be determined by arbitration, as provided in Paragraph 20 of the said Agency Agreement.

5. Celotex and its customers may dispose of their present stock of hardboard products made from bagasse. Celotex may within thirty (30) days from date hereof manufacture not to exceed 300,000 square feet as may be required to fill its present outstanding export contracts.

6. In the event the Supreme Court of the United States, or any court of inferior jurisdiction from which no appeal is taken, should hold in any subsequent proceedings that Patent No. 1,663,505 is invalid or should substantially limit the scope of the

claims thereof, Masonite agrees that Celotex shall be accorded the benefit of such decision and relieved from the estoppel of the decree in the aforesaid litigation against Celotex to the extent indicated by such later decision. It is understood that the provisions of this paragraph 6 shall not be operative so long as Masonite shall in good faith continue to litigate the questions of validity and/or infringement or said patent. The provisions of this paragraph 6 shall continue in force during the term of said Patent No. 1,663,505.

7. Celotex agrees to promptly have an order entered by each of the courts in which said Hobart P. Young is Receiver approving the terms of this Agreement and said Agency Agreement.

In witness whereof, Celotex has affixed its signature hereto and Masonite has caused its corporate name to be signed by its duly authorized officer the day and year first above written.

(Signed) HOBART P. YOUNG,
As Receiver of The Celotex Company.

MASONITE CORPORATION,
(Signed) JAMES P. GILLIES, V. P.

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Exhibit S—26

THE INSULITE COMPANY

PATENTS RELATING TO HARDBOARD ISSUED OR FILED UP TO FEBRUARY 1935

No.	Date	Inventor	Title
1,839,660	Jan. 5, 1932	George H. Ellis	Process of Making Waterproof Insulating Bodies. (Filed August 10, 1929.)
1,900,698	Mar. 7, 1933	George H. Ellis	Insulating Body. (Filed August 10, 1929.)
1,900,699	Mar. 7, 1933	George H. Ellis	Waterproof Insulating Body. (Filed November 15, 1929.)
1,905,222	Apr. 25 1933	George H. Ellis	Fireproof Bodies and Process For Making The Same. (Filed July 19, 1930.)
1,908,699	May 16, 1933	George H. Ellis	Means for Feeding Articles To and Withdrawing Them from a Press. (Filed October 20, 1930.)
2,030,625	Feb. 11, 1936	George H. Ellis	Apparatus For and Process of Making Synthetic Products. (Filed January 13, 1934.)
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2,030,626	Feb. 11, 1936	George H. Ellis	Fibrous Product and Method of Making the Same. (Filed April 27, 1934.)
2,030,466	Apr. 7, 1936	George H. Ellis	Method of Making Synthetic Products. (Filed June 21, 1930.)
2,134,659	Oct. 25, 1938	George H. Ellis	Synthetic Fibrous Product and Process of Making the Same. (Filed Jan. 13, 1934.)
2,143,831	Jan. 10, 1939	G. H. Ellis et al	Synthetic Products and Process For Making Them. (Filed Jan. 2, 1932.)

355 *Exhibit S–29*

United States District Court, District of Minnesota, Fourth Division

In Consolidated Proceedings for Reorganization of a Corporation

No. 11640. No. 17

In the Matter of MINNESOTA AND ONTARIO PAPER COMPANY, A CORPORATION, DEBTOR

ORDER AUTHORIZING TRUSTEES TO CAUSE THE INSULITE COMPANY TO MAKE CERTAIN CONTRACTS WITH MASONITE CORPORATION, INCLUDING DISMISSAL WITHOUT PREJUDICE OF PATENT SUIT PENDING IN NORTHERN DISTRICT OF PENNSYLVANIA

Messrs. C. T. Jaffray, R. H. M. Robinson, and S. M. Archer, as Trustees of Minnesota and Ontario Paper Company, debtor, having presented and filed their verified petition for an order authorizing said Trustees to cause The Insulite Company to make certain contracts with the Masonite Corporation, and providing for the dismissal without prejudice of a certain patent suit pending in the United States District Court of Pennsylvania, and the Court having read and examined said petition and the proposed contracts thereto attached, and being fully advised in the premises, and on motion of counsel for said Trustees,

Is it hereby ordered that said Trustees be and they hereby are authorized and empowered to cause The Insulite Company, a wholly owned subsidiary of Minnesota and Ontario Paper
356 Company, to execute and deliver the proposed contracts in the form attached to said petition, of which Exhibits "A," "B," and "C," hereto attached are copies, with such amendments thereto and modifications thereof, if any, as may from time to time be approved by said Trustees.

Dated this 2nd day of February 1935.

By the Court.

(Sgd.) JOSEPH W. MOLYNEAUX,
Judge.

356–A *Exhibit S–30*

AGENCY AGREEMENT AND LICENSE OPTION

This Memorandum of Agreement made this 31st day of October 1933, by and between Masonite Corporation, a Delaware Corporation, having its principal sales office at Chicago, Illinois (herein-

after called the Manufacturer) and National Gypsum Company, a Delaware Corporation, having a principal business office at Buffalo, New York, (hereinafter called the Agent), witnesseth:

1. The Manufacturer owns the United States Letters Patent and Applications for Letters Patent shown on Schedule 1 attached hereto under which it is manufacturing and selling hard board products which the agent is desirous of selling, the validity of which Letters Patent is expressly acknowledged by the Agent *so long as this agreement shall remain in force*, but such acknowledgment of validity shall extend only to the use of said inventions with respect to hard board products.

For the purpose hereof, hard board products shall be deemed to be those products covered by or made under the processes of said patents or applications for patents or any of them having a density in excess of twenty-five (25) pounds per cubic foot and having as their major constituent wood or woody fibres and being a homogeneous, hard, dense, and grainless material; said products are hereinafter referred to as hard boards or as hard board products.

2. The Manufacturer hereby appoints said Agent as a del credere factor and hereby authorizes said Agent and licenses it under said Letters Patent to sell the said hard board products manufactured by said Manufacturer as covered in Section 4 hereof throughout the Continental United States and Hawaii on the terms, prices, and conditions hereinafter more particularly stated.

3. The Agent agrees to promote the sale of hard boards manufactured by the Manufacturer, but nothing herein contained shall be construed as requiring it to use any greater degree of diligence than shall be determined to be reasonable by the Agent.

4. The Manufacturer agrees to manufacture such of its products as are shown on the Exhibit A, attached hereto, in the standard sizes therein shown, in such quantities as may be reasonably required by the Agent to enable it to fill its orders; and to promptly ship on orders and specifications from the Agent to any place within the Continental United States or Hawaii, at its list prices then currently in effect. In event the Manufacturer shall during the life of this agreement manufacture and sell other hard board products under said Letters Patent, or any of them, the Manufacturer shall notify the Agent thereof, together with prices, discounts, etc., and the Agent shall have the right to have such products, included with the products listed in said Exhibit A, and to have such products available to the Agent with commissions fairly comparable to those herein specifically set out.

5. The Manufacturer shall from time to time designate the minimum selling price and maximum terms and conditions of sale

at which the Agent shall sell Manufacturer's products hereunder, except as provided in Section 10 hereof, and in Section 24 hereof.

The right to change the list prices and terms of sale is vested solely in the Manufacturer, but the Manufacturer agrees that the list prices and terms of sale from time to time in effect shall be the minimum prices and maximum terms of sale at which it is either offering to or actually making sales to its respective classes of customers and that it will not depart therefrom excepting after proper notice to Agent as elsewhere herein provided. The Manufacturer shall give to the Agent not less than ten (10) days' notice of any change in the minimum selling price or terms or conditions of sale previously designated by the Manufacturer.

In event of change in the selling price or terms or conditions of sale, the new prices or terms shall take effect and shall apply to all shipments made ten (10) days after the giving of notice by the Manufacturer to the Agent, excepting only bona fide orders actually received and accepted by the Agent before receipt of such notice and ordered shipped by the Agent within thirty (30) days after receipt of such notice. All notices of change in selling price or terms or conditions of sale shall be given by the Manufacturer to the Agent by telegraph at the close of the business day, and the Manufacturer agrees not to release the same to its own sales organization or customers prior to the opening of business on the day following the sending of the notice.

6. In event the Agent shall make sales of hard board hereunder at prices less than the minimum price, or on terms or conditions of sale more favorable than those designated by the Manufacturer, except as provided in Section 10 hereof, the Agent shall pay to the Manufacturer in respect of such sales so made the amount due to the Manufacturer for the sales price of such product as provided by the price list then in effect plus liquidated damages in the amount of Ten Dollars ($10) per 1,000 square feet. The payment of such sum in respect of any such sales shall not deprive the Manufacturer of its right of canceling this agreement for cause.

If the Agent unintentionally violates this agreement in the manner set forth in this section, as, for example, by a bone fide error of calculation, or the like, then the Agent shall pay to the Manufacturer in respect of such sales so made the amount due the Manufacturer on the sales price of such products as provided by the price list then in effect plus the difference between the price or terms of sale at which the hard board products were actually sold and the price list or terms of sale thereof, and the Manufacturer shall have no right to cancel this agreement on account of such unintentional violation. If the Manufacturer does not agree that such violation was unintentional, the Agent shall have

the right to have the question referred to arbitration as provided in Section 20 hereof, and the burden shall be on the Agent to prove that the violation was unintentional.

7. The Manufacturer agrees to ship hard boards in accordance with the orders and specifications of the Agent. Said Agent agrees that on direct shipments to the Agent said hard boards shall be received and held on consignment, and that the title thereto shall remain in the Manufacturer until sold by the Agent.

8. The Agent agrees to compensate the Manufacturer as follows: One-half of the difference between the list price thereof and the Agent's discount thereon shall be advanced by the Agent within twenty (20) days after the close of the calendar month in which the order is shipped by the Manufacturer, and the balance thereof shall be paid within twenty (20) days after the close of the calendar month in which such shipment is made of hard board products sold by the Agent to its customers. In event the Agent directs the Manufacturer to ship goods directly to its customers, the Agent shall pay the entire amount due the Manufacturer within twenty (20) days from the close of the calendar month in which the product is shipped. A shipment of a "long" as hereinafter defined shall be considered a shipment of a full board and shall be reported and paid for accordingly by the Agent to the Manufacturer.

It is understood and agreed that the minimum prices of the products stated in said price list and which are to be observed by the Agent are F. O. B. cars, Manufacturer's factory, and that the Agent is responsible for and shall pay to or indemnify the Manufacturer for all necessary freight or transportation costs, together with all sales or similar taxes, excises, and charges which are now or hereafter may be directly levied, imposed, or charged (whether by Federal, State, Municipal, or other public authority) in respect of the sale of products sold and distributed by the Agent hereunder. The Agent shall make all reports required by public authorities in respect of such sales. When authorized by law imposing any sales or similar tax, excise, or charge, the same shall be reflected in the price and properly stated in the price list.

The Agent agrees, at its own expense, to carry adequate insurance against usual hazards covering all products consigned to it, and all policies shall, if required by the Manufacturer, be payable to the Agent and to the Manufacturer as their respective interests may appear.

9. The parties hereto agree that the Agent's compensation shall be by way of commission on each sale of products sold (excluding sales or similar taxes if any) and shall be computed on the basis

of the following schedule, the footage to be determined upon the total aggregate footage of all products sold during the year:

	First bracket up to 5,000,000 sq. ft.	Second bracket over 5,000,000 up to 10,000,000 sq. ft.	Third bracket over 10,000,000 up to 15,000,000 sq. ft.	Fourth bracket over 15,000,000 up to 20,000,000 sq. ft.	Fifth bracket over 20,000,000 sq. ft.
¼" Presdwood	45%	46%	48%	49%	50%
Presdwood over ¼", Quartrboard, De Luxe Quartrboard, and Temprtile	35%	36%	38%	39%	40%

The Agent shall be entitled to be paid currently by way of commission at the minimum rate shown in the first bracket and the Manufacturer shall as soon as practicable after the close of each year pay to the Agent such sum as will make the Agent's compensation for that year the flat rate as shown in the bracket in which the Agent's yearly sales shall fall.

On all sales of Tempered boards and on hard boards wrapped by Manufacturer the commission shall be the Agent's commission (as provided in this section) on the sale of the particular hard board sold plus ten percent (10%) of the additional charge or charges made in accordance with the minimum selling price list for the Tempered and/or wrapped products. On hard board wrapped by Agent, Agent shall be entitled to retain said wrapping charge.

(This paragraph omitted pursuant to Rule 580 of the Rules and Regulations of the Securities and Exchange Commission under the Securities Act of 1933, as amended.)

10. The Manufacturer shall not be obligated to manufacture or ship any hard board in a size more than 12' by 4' (with or without saw kerf allowance, and trimmed or untrimmed, as may be designated by Agent), or in thickness less than 1/8" or greater than 5/16", except that if Manufacturer offers for sale or sells any hard board product of sizes or thickness other than as elsewhere herein specifically provided and not covered in the minimum selling price list, then Manufacturer shall be obligated to include such product in its appropriate minimum price list and to make such product available to Agent with Commissions fairly comparable to those herein specifically set out.

The Manufacturer will, if indicated by the Agent at the time of placing the order, cut each board into not more than two pieces. Any piece 5 feet long or longer shall be styled a "long," and any piece shorter than 5 feet shall be styled a "short." The prices at which the Agent may make sales of full boards or "longs" are to be covered by the current price lists aforesaid, and the prices at

which the Agent may sell "shorts" are likewise to be covered by said lists, when sold to classes of trade to which the Agent may sell "longs" as hereinafter provided. To other classes of trade, Agent may sell "shorts" at prices to be determined by Agent.

The Agent shall not be permitted to make sales of "longs" to any person other than dealers and to the various branches of the United States Government, except that such sales may be made to wholesalers, jobbers, and regularly established selling agents of Agent. Upon request of Manufacturer, the Agent shall supply the Manufacturer with copies of contracts (except current orders) made with the excepted classes as above defined.

For the purpose of this agreement, a dealer is defined as being any person, firm or corporation who maintains an adequate plant or plants equipped for service to the public with office, storage yard and warehouse kept open during business hours, a sales service, and carries a sufficient stock of Insulation Industry Products and/or other building materials, for the purpose of selling at retail, to supply the normal requirements of the community.

11. If the Agent or its customers so desire, the Manufacturer will, without extra cost, brand or mark all hardboards with such Agent's or customer's name or trade mark or other indicia as may be reasonably requested by the Agent. The Agent expressly agrees that it will not use the trade-names "Masonite" or any of the trade-marks of the Manufacturer, including the trade-names "Presdwood," "Quartrboard," "Temprtile," and "Tempered Presdwood," but nothing herein shall prevent Agent's designation of Tempered board by the use of the word "tempered."

12. The Manufacturer reserves the right to mark all products sold by the Agent with such patent notice as it may be advised by counsel is necessary for its protection, but no such marking shall in any manner deface the said products nor in any manner differ from the method used by Manufacturer in so marking said products marketed to its own trade by Manufacturer.

13. The Manufacturer agrees that all products which may be manufactured and shipped by it on order of the Agent shall be good, workmanlike products of a character and quality equal to that currently manufactured by it and sold to its customers. The Manufacturer's liability shall be limited to replacing delivered to Agent or its customers, without cost to the Agent, any defective material when the defect is one of manufacture.

14. The Agent agrees to report on or before the twentieth day following the close of each calendar month to the Manufacturer on forms furnished by the Manufacturer, giving an inventory of all products consigned to the Agent and on hand and unsold at the end of said month in such detail as may reasonably be requested by the Manufacturer.

15. In event the Agent shall fail or refuse to keep or perform any of the conditions or agreements on its part to be kept and performed, then the Manufacturer shall have the right and option to terminate this agreement by serving written notice of its intention so to do, which notice shall state the default or defaults for which the license is to be terminated. If withing thirty (30) days after receipt of said notice, the Agent shall not have cured said defaults said cancellation shall become absolute, otherwise it shall be deemed to have been withdrawn. The Manufacturer shall also have the right of cancelling this agreement at any time by written notice in the event the Agent shall fail to have ordered from the Manufacturer at least one and a half million (1,500,000) square feet of hard board products for any six months' period or if the Agent shall hereafter be adjudicated bankrupt or insolvent or a receiver shall be appointed therefor.

The Agent shall have the right of cancelling this agreement by six months' notice in writing to the Manufacturer.

In event of termination of this agreement for any reason, the Agent shall fully comply up to the date of the termination period and shall at said time purchase and pay for all products consigned to it and unsold, or at the option of the Manufacturer shall return all or so much thereof as it may request. On all goods returned, the Manufacturer shall refund to the Agent all advances made by the Agent to or for the account of the Manufacturer in respect of such goods, including right and reasonable handling charges.

16. The Manufacturer shall not be liable for failure to deliver or delays in deliveries caused by strikes, riots, lock-outs, car shortages, fire, floods, storms and other acts beyond its control.

The Manufacturer shall not be required to accept orders or deliver hardboard products in excess of its manufacturing capacity, it being understood and agreed that the Manufacturer is selling hardboard products on its own account as well as through the Agent and other Agents.

In event orders are received in excess of Manufacturer's plant capacity, or any one or more of its several products, it will pro rate among all sales of such product or products, including therein its direct sales, any necessary reductions, on the basis of the sales volume for the preceding six months' period of such product or products.

17. The Manufacturer agrees that at any time while the Agent is in good standing hereunder, it will at the request of the Agent issue to the Agent a license to manufacture and sell hard boards under the Letters Patent aforesaid substantially in the form annexed hereto and marked Exhibit B, provided, however, that

the down payment for such license shall be made according to the following schedule:

If the license is issued:

before December 31, 1934	$200,000.00
before December 31, 1935	175,000.00
before December 31, 1936	150,000.00
before December 31, 1937	125,000.00
before December 31, 1938	100,000.00
before December 31, 1939	75,000.00
before December 31, 1940	50,000.00
if issued thereafter	50,000.00

18. The Manufacturer shall have the right from time to time and at any reasonable time, through a firm of certified public accountants, to inspect and examine the physical inventory and books and records of the Agent relating to any of the transactions or matters which are the subject of this agreement, but such accountants shall not divulge to the Manufacturer any confidential or commercial information.

19. The Manufacturer hereby warrants that none of the hard boards covered by this agreement, when used for the general purposes for which such hard boards are customarily designed or intended, infringes or will infringe any Letters Patent owned by others than the parties hereto, and agrees to save harmless and protect the Agent, as well as the customers secured by the Agent, against any claim or demand based upon such alleged infringement, and, upon notice, agrees to appear and defend at its own expense any and all suits at law or in equity arising from such alleged infringement, conditioned that the Manufacturer shall have full control of the defense of such suits.

It is further agreed that if it be finally adjudicated that any Letters Patent or claim thereof is valid, and any of the hard boards covered by this agreement constitute an infringement thereof or of any of the valid claims thereof, so as to impair the commercial production thereof by the Manufacturer, then in any such events this agreement insofar as it applies to such hard board products as should be covered by such Letters Patent or claims thereof so held to be valid and infringed shall be cancelled or suspended.

20. All disputes and differences arising out of this agreement shall be settled and finally determined in the City of Chicago, Illinois, by arbitration in the following manner: Each party to this agreement shall appoint an arbitrator. If the two arbitrators so appointed cannot agree within a month after their appointment, they will select a third arbitrator. The decision in writing of the three arbitrators, or any two of them, shall be final and

binding upon the parties hereto, who shall conform to and abide by said decision. If either party fails to appoint its arbitrator within fourteen (14) days after notice in writing requiring it so to do, the arbitrator appointed by the other party shall act for both; his decision in writing shall be final and binding upon both parties, as if he had been appointed by consent, and both parties thereto shall conform to and comply therewith.

21. Sales of hard boards covered by this agreement made by any subsidiary, affiliated, or controlled company now or hereafter organized, owned, affiliated or controlled by or with the Agent, shall be deemed to be sales made by such Agent for the purpose of this agreement. The Agent may reconsign products of the Manufacturer to sub-agents with the approval of the Manufacturer on condition that title to said products shall remain in the Manufacturer and the sub-agent shall conform to all the sales terms and sales conditions of this agreement.

22. This agreement is not assignable by the Agent without the written consent of the Manufacturer, except that this agreement and the rights thereunder may be assigned to a person, firm or corporation acquiring all or substantially all of the assets and business of the Agent, and which assignee shall in writing assume all the obligations of the Agent under this agreement.

23. This agreement shall continue during the life of that one of the Letters Patent or applications for Letters Patent aforesaid having the longest term to run, including any reissues, extensions or improvements thereof, unless sooner terminated by act of either party.

24. The Manufacturer reserves to itself the right to sell hardboard products to the moving picture industry and nothing herein contained shall be construed as permitting the Agent to make sales to such industry directly or indirectly and the prices made by the Manufacturer for sale or resale to said industry shall not be deemed to be sales to a class of customers in which the Agent has any interest or to be within the purview of Section 5 hereof, and said Exhibit A, which is the Manufacturer's dealer price list currently in effect, has no reference to sales to or for said industry.

In Witness whereof, the Agent has affixed his signature hereto and the Manufacturer has caused its corporate name to be signed by its duly authorized officer the day and year first above written.

[SEAL] NATIONAL GYPSUM CO.

(Signed) M. H. BAKER, *Pres.*

[SEAL] MASONITE CORPORATION,

By (Signed) BEN ALEXANDER.

President.

EXHIBIT A—MASONITE DEALER PRICES

	M sq. ft.	
Presdwood:		
1/8" untempered	$40.00	4' x 12' and 4' x 6'
1/8" untempered	$44.00	4' x 8'—4' x 9'—4' x 10'
Tempered: $10.00 higher.		
5/16" untempered	$52.00	4' x 12' and 4' x 6'
5/16" untempered	$56.00	4' x 8'—4' x 9'—4' x 10'
Tempered: $10.00 higher.		
1/4" untempered	$75.00	All 4' x 12'
Tempered: $10.00 higher.		
7/16" untempered	$100.00	All 4' x 12'
Tempered: $10.00 higher.		
Wrapping: $1.00 extra.		
Quartrboard:		
Quartrboard	$30.00	4' x 12' and 4' x 6'
"	$32.00	4' x 8'—4' x 9'—4' x 10'
De Luxe Quartrboard	$40.00	4' x 12' and 4' x 6'
" "	$44.00	4' x 8'—4' x 9'—4' x 10'
Presdwood shorts:		
1/8" B & B	$30.00	1' x 4'—2' x 4'—3' x 4'—4' x 4'
5/16" B & B	$45.00	1' x 4'—2' x 4'—3' x 4'—4' x 4'
Tempered: $10.00 per M sq. ft. higher in each case.		
Wrapping: $1.00 per M sq. ft. extra.		
Temprtile:		
1/8" Temprtile	$70.00	All 4' x 12'
5/16" "	$90.00	All 4' x 12'

Schedule 1—Issued Patents and Applications

Patent No.	Date	Title and Subject Matter
1,578,609	3/30/26	"Process and Apparatus for Disintegration of Wood and the Like." The original explosion patent.
1,655,618	1/10/28	"Apparatus for and Process of Explosion Fibration of Lignocellulose Material." Covers the gun battery.
1,663,504	3/20/28	"Press-Dried Structural Insulating Board and Process of Making Same." "Quartrboard."
1,663,505	3/20/28	"Hard Grainless Fiber Products and Process of Making Same." "Presdwood."
1,663,506	3/20/28	"Integral Insulating Board with Hard Welded Surfaces."
1,767,539	6/24/30	"Process of Making Composition Boards and the Like and Apparatus Therefor." Thirty-three claim patent covering the manufacture of hardboard apparatus mainly.
1,784,993	12/16/30	"Water Resistant Fiber Product and Process of Manufacture." Incorporating size in the water bath.

1,812,969	7/7/31	"Process of Making Integral Insulating Board with Hard Welded Surfaces." Divisional of patent No. 1,663,506, covering the process.
1,824,221	9/22/31	"Process and Apparatus for Disintegration of Fibrous Material." Improvements on original explosion patent (1,578,609).
1,844,861	2/9/32	"Process for the Manufacture of Vegetable Fiber Products." Improvements on Presdwood patent covering structural features.
1,844,921	2/9/32	"Production of Hard Dense Bodies of Vegetable Fiber." Covers frosted surface press platen.
1,849,307	3/15/32	"Press Loader."
1,903,222	3/28/33	"Presses." Covers movable screen in press.
1,923,105	8/22/33	"Process for Production of Non-Warping Fiber Boards." Humidifier process.
1,923,106	8/22/33	"Apparatus for Production of Non-Warping Fiber Boards." Division of 1,923,105. Covers Humidifier apparatus.
1,923,548	8/22/33	"Article Handling System." Division of 1,767,539, the thirty-three claim patent.
1,923,549	8/22/33	"Article handling System." Second division of thirty-three claim patent.
1,924,162	8/29/33	"Cut-off Machine."

PATENTS OWNED BY MASONITE CORPORATION

Patent No.	Date	Title
1,383,370	7/5/21	Process of Splitting Mica (Bancroft).
1,485,894	3/4/24	Apparatus for Manufacturing Pulp Articles (Sutherland).
1,506,789	9/2/24	Apparatus for Drying Pulp Products (Sutherland).
1,548,135	8/4/25	Refining Engine (Gamble).

Pending Applications

Serial No.	Filed	Title and Subject Matter
611,431	5/14/32	"Vegetable Fiber Products and Process of Making Same." Double Pressing Operations.
612,072	5/18/32	"Hard Vegetable Fiber Products of High Strength and Process of Making Same." Tempering of Pressdwood. Case allowed.

Exhibit B—License

This Memorandum of Agreement made this _____ day of _____, 19___, by and between Masonite Corporation, a Delaware Corporation, having its principal sales office at Chicago, Illinois (hereinafter called the Licensor) and _____ _____ _____

3. In the event the Licensee shall make sales of hardboard hereunder at prices less than the minimum price, or on terms or conditions of sale more favorable than those designated by the Licensor, the Licensee shall pay to the Licensor in respect of such sales so made the amount due to the Licensor for the sale price of such product as provided by the list prices then in effect plus liquidated damages in the amount of Ten Dollars ($10) per 1,000 square feet. The payment of such sum in respect of any such sales shall not deprive the Licensor of its right of cancelling the agreement for cause.

If the Licensee unintentionally violates this agreement in the manner set forth in this section, as, for example, by a *bona fide* error of calculation, or the like, then the Licensee shall pay to the Licensor the difference between the price at which the hardboard products were actually sold and the list price thereof, and the Licensor shall have no right to cancel this agreement on account of such unintentional violation. If the Licensor does not agree that such violation was unintentional, the Licensee shall have the right to have the question referred to arbitration, as provided in Section 17 hereof, and the burden shall be on the Licensee to prove that the violation was unintentional.

4. The right to change the list prices and terms of sale and the differential between hardboard sold to dealers (including the various branches of the United States Government) and that sold for industrial purposes is vested solely in the Licensor, but the Licensor agrees that the list prices and terms from time to time in effect shall be the prices and terms at which it is either offering to or actually making sales to its respective classes of trade, and that it will not depart therefrom to the detriment of the Licensee. Licensor shall likewise, subject to the same conditions, set list prices and terms covering sale of hardboard to wholesalers, jobbers and regularly established selling agents of Licensee, to which class the sales shall be made at special list prices and terms. Upon request by Licensor, the Licensee shall supply the Licensor with copies of contracts (except current orders) made with any such wholesalers, jobbers or regularly established selling agents of Licensee. For the purpose of this contract, a dealer is defined as being any person, firm or corporation who maintains an adequate plant or plants, equipped for service to the public with office, storage yards and warehouses kept open during business hours, a sales service, and carries a sufficient stock of Insulation Industry Products and/or other building materials, for the purpose of selling at retail, to supply the normal requirements of the community.

Licensee agrees to pay Licensor on the 25th day following the close of each calendar month for all hardboards manufactured

by it during said month under the said patents or any of them, a royalty of ten (10) per centum on the then F. O. B. plant current list price of hardboards as then in effect by the Licensor. The royalty shall be the same upon all hard boards of 4′ x 12′ or less. Licensee shall have no right to sell boards of larger area without the express consent of the Licensor and on a royalty rate to be agreed upon.

6. If, in any year, the royalties paid by the Licensee shall be less than $50,000, it shall within forty days after the end of said year, pay any such deficiency over to the Licensor. The Licensee agrees to report to the Licensor (under oath if requested) on or before the 25th day following close of each calendar month, on forms furnished by the Licensor, giving amount of hardboards manufactured during the preceding calendar month.

The Licensee agrees to keep proper books of account and the Licensor shall have the right from time to time, at any reasonable time, through a firm of certified public accountants, of inspecting and examining the physical inventory and books and records of the Licensee, relating to any of the transactions or matters which are the subject of this license, but such accountants shall not divulge to the Licensor any confidential or commercial information.

7. It is understood and agreed that the license hereby granted shall be personal to the Licensee and to such of its subsidiaries in which it may own and control a majority of the voting stock, and that neither said license nor any right thereunder or hereunder shall be sold, assigned, or transferred by the Licensee without written consent of the Licensor, excepting to a corporation which may acquire all or substantially all of the assets and business of the Licensee, and which corporation shall in writing assume all of the obligations of the Licensee under this agreement.

8. The Licensee agrees that all of said hardboard products embodying the inventions and improvements set forth and claimed in said patents and applications, or the package in which the same is shipped by the Licensee, shall be distinctly marked with the word "Patent" or the words "Patent Applied For" as the case may be, together with the number of any such patents or applications specified by the Licensor, the claims of or under which may be embodied in said hardboard, and in connection with said marking the Licensee will further mark said board or the package in which the same is shipped by the Licensee with the words "Licensed Under the Above Letters Patent" or "Licensed Under Pending Applications for Letters Patent" as the case may be.

9. As one of the considerations for the license and privilege hereby granted, Licensee agrees that it does, and, so long as this license agreement shall continue in force, will continue to admit

the validity of each and every of the Letters Patent or which may be issued on the applications for Letters Patent listed in Schedule 1 and of patents for improvements, but such acknowledgement of validity shall extend only to the use of said inventions with respect to hardboard products; that it will not, within the scope of the above limitation, at any time during the existence of said license, directly or indirectly by itself or through or together with another or others, contest the validity of either or any of said Letters Patent, or the scope of the claims thereof or thereunder, or the title of the Licensor thereto.

10. The Licensor hereby warrants that none of the hardboard products covered by this agreement, when used for the general purpose for which hardboard products are customarily designed or intended, infringes or will infringe any Letters Patent owned by others than the parties hereto, and agrees to save harmless and protect the Licensee, as well as the customers secured by the Licensee, against any claim or demand based upon such alleged infringement, and upon notice, agrees to appear and defend at its own expense any and all suits at law or in equity arising from such alleged infringement conditioned that Licensor shall have full control of the defense of such suits.

It is further agreed that if it be finally adjudicated that any patent or claim thereof is valid, and any of the hard boards covered by this license agreement constitute an infringement thereof or any of the valid claims thereof so as to impair the commercial production thereof by Licensee, then in any such events this agreement insofar as it applies to such hardboard products as should be covered by such patents or claims thereof so held to be valid and infringed shall be cancelled or suspended.

11. The Licensor agrees to afford reasonable patent protection and to that end to diligently prosecute infringements of the said Letters Patent scheduled in said Schedule 1 or any that may be granted for improvements to the end that such infringers may be enjoined from manufacturing and selling homogeneous pressed hardboards embodying the inventions and improvements set forth in said Letters Patent or any of them.

In case in any suit upon any of said letters patent it shall be finally adjudicated that the process, product or machine therein complained of as an infringement of any of said Letters Patent, is not an infringement thereof, or that the manufacture, use or sale thereof by any party to such suit, other than the Licensor, cannot be enjoined, then the Licensee shall be permitted thereafter to manufacture, use and/or sell (as appropriate) such process, product, or machine free from the restrictions of this agreement and without payment thereunder of any license fees or royalties therefor insofar as said patent is concerned. It is

understood that the provisions of this paragraph shall not be effective so long as Masonite shall in good faith continue to litigate the question of validity and/or infringement of said patent.

12. In event the Licensor shall grant any license to any other person, firm or corporation under the patents and applications aforesaid or any of them on terms or with provisions more favorable than herein granted to the Licensee, the Licensee shall be entitled to have the benefit of such more favorable terms or provisions.

13. The Licensor will, upon request of the Licensee, furnish the Licensee with cooperation, advice, and counsel to assist the Licensee in making its plant or plants ready for the manufacture of hardboards embodying the inventions and improvements set forth and claimed in said Letters Patent and applications for Letters Patent, and will, upon request, furnish to the Licensee the advice and instructions of the Licensor's experts, together with such information as it possesses in respect of the purchase and cost of machines and appliances used in the manufacture of said hardboard products. In the event the Licensee shall so request and shall pay or agree to pay to the Licensor such reasonable attendant expenses for such services as Licensee may request, the Licensor then agrees to send its experts to the plant or plants of the Licensee to assist and instruct the Licensee or its agents or employees in the practical operation of such plant or plants.

14. The Licensor agrees to disclose to the Licensee promptly all information and formulas which it now has relating to the process of making hardboards or of machines or processes for making the same as set forth and claimed in said patents and applications for patents set forth in Schedule 1, together with a description of the machines or appliances which it now utilizes in the manufacture of said board.

The Licensee agrees to disclose to the Licensor promptly all information which it now has or may hereafter from time to time acquire relating to improvements in hardboard products as defined herein, the processes, or machines for making the same, and when requested by the Licensor to file patent applications therefor in such countries as the Licensor may designate, and to assign an undivided half interest therein to the Licensor, one-half the cost and expense thereof to be borne by the Licensor.

15. The Licensee expressly agrees that it will not use the trade name "Masonite" or any name similar thereto, nor any of the trademarks of the Licensor, including the trade-names "Presdwood," "Quartrboard," "Temprtile," and "Tempered Presdwood," but nothing herein shall prevent Agent's designation of Tempered board by the use of the word "tempered."

16. In event the Licensee shall fail or refuse to keep or perform any of the conditions or agreements on its part to be kept and performed, then the Licensor shall have the right and option to terminate this agreement by serving written notice of its intention so to do, which notice shall state the default or defaults for which the license is to be terminated. If within ninety (90) days after the receipt of said notice, the Licensee shall not have cured said defaults, said cancellation shall become absolute, but if within said ninety (90) day period the default or defaults complained of shall have been cured, then such notice shall be deemed withdrawn. In the event that the Licensee shall hereafter be adjudicated bankrupt or insolvent or a Receiver shall be appointed therefor, the Licensor reserves the right to cancel this contract. The term Licensee shall include any of its subsidiaries as defined in paragraph 7 hereof.

Cancellation shall not relieve the Licensee from any liability accrued up to the time of the termination of this license agreement.

17. All disputes and differences arising out of this contract shall be settled and finally determined in the City of Chicago, Illinois, by arbitration in the following manner: Each party to this agreement shall appoint an arbitrator. If the two arbitrators so appointed cannot agree within a month after their appointment, they will select a third arbitrator. The decision in writing of the three arbitrators or any of two of them, shall be final and binding upon the parties hereto, who shall conform to and abide by said decision. If either party fails to appoint its arbitrator within 14 days after notice in writing requiring it so to do, the arbitrator appointed by the other party shall act for both; his decision in writing shall be final and binding upon both parties, as if he had been appointed by consent, and both parties thereto shall conform to and comply therewith.

18. This license shall continue in force during the life of that one of the said patents having the longest term to run and/or applications and/or patents for improvements including all reissues, renewals, extensions, and improvements thereof, unless sooner terminated by the act of either party.

IN WITNESS WHEREOF, the Licensee has affixed his signature hereto and the Licensor has caused its corporate name to be signed by its duly authorized officer the day and year first above written.

MASONITE CORPORATION,

By ——— ———

AGENCY AGREEMENT AND LICENSE OPTION

Masonite Corporation to ----------

Date --------

356-B *Exhibit S-32*

SUPPLEMENTAL AGREEMENT

This Memorandum of Agreement made this 30th day of November, 1933, by and between Masonite Corporation, a Delaware Corporation, having its principal sales office at Chicago, Illinois, hereinafter called Manufacturers, and Johns-Manville Sales Corporation, a Delaware Corporation, having its principal place of business at 22 East 40th Street, New York City, hereinafter called Agent, witnesseth:

Whereas, there is pending between the parties hereto an agreement entitled Agency Agreement and License Option executed between the parties hereto on the 30th day of November, 1933, and

Whereas, the execution of said Agreement and Option by Agent was conditioned on the execution of this Supplemental Agreement:

Now, therefore, the parties agree as follows:

1. The purchase by the Agent from Oswego Board Corporation for the purpose of resale of Fibre Board Products (including PanLboard) of the character now made by the said Oswego Board Corporation, or the selling, as Agent, of such Fibre Board Products as are now manufactured by Oswego Board Corporation under contract between the Agent, or Johns-Manville Corporation and Oswego Board Corporation, shall not be considered a violation by the Agent of any of the provisions of the Agency Agreement, a breach of the agency relationship established thereby or an infringement by the Agent of any of the patents referred to therein or in Schedule 1.

2. The term "for cause" as used in Section 6 of the said Agency Agreement shall be interpreted to mean any breach of contract or provisions of said Agency Agreement.

3. The third paragraph of Section 8 relating to insurance shall not require the Agent to take out new insurance or to make any changes in the policies of insurance now in effect, it being understood that the Agent carries general insurance of the so-called "Floater" type; it also being understood that the Agent agrees to indemnify the Manufacturer for any losses caused by the usual hazards as provided for in said Section 8.

4. In the event the effective date of a change in price, as provided for in Section 5, shall occur after the Agent shall have made the initial one-half payment called for by Section 8 in respect of any shipment or shipments and before the date the second one-half payment or payments shall have become due, then any such second one-half payment shall be calculated on the basis of the new price (whether such new price represent an increase or decrease) and

no adjustment shall be made in respect to the payment already made.

5. In the event the Agent shall be required, upon the termination of the agreement, to purchase and pay for any products on consignment with Agent and unsold, as provided in the third paragraph of Section 15, the purchase price of such products shall be the dealer prices in effect at the date the products were consigned to the Agent less a percentage equal to Agent's compensation in the event of sale.

6. The meaning of the first sentence of the last paragraph of Section 9 is illustrated by the following example: A sale of 1,000 sq. ft. of 1/8" untempered Presdwood would entitle the Agent to compensation (under the first bracket) of $18. If the sale was of tempered 1/8" Presdwood wrapped by the Manufacturer the dealer price would be $51 and Agent's compensation would be $19.10.

7. In the event the Manufacturer shall make any agency agreement with respect to the sale of all or any of its hard board products, as defined in the said Agency Agreement, on terms or with provisions more favorable to the Agent than granted to Johns-Manville in said Agency Agreement, then Johns-Manville shall be entitled to have the benefit of such more favorable terms or provisions. The making by the Manufacturer of freight allowances to partially off-set geographical inequalities or the making of temporary concessions necessary to the settlement of litigation shall not be deemed to be provisions more favorable to the Agent. Manufacturer agrees to promptly supply Johns-Manville with copies of all other Agency Agreements. In event of any dispute arising between the parties hereto as to the application of this Paragraph 7, the same shall be determined by arbitration, as provided in Section 20 of the said Agency Agreement.

In witness whereof, the Agent has affixed its signature and the Manufacturer has caused its corporate name to be signed by its duly authorized officer the day and year first above written.

JOHNS-MANVILLE SALES CORPORATION,
(Signed) By E. M. VOORHEES.
MASONITE CORPORATION,
(Signed) By JAMES P. GILLIES.

356-C

Exhibit S-34

SUPPLEMENTAL AGREEMENT

This Memorandum of Agreement made this 1st day of December, 1933, by and between Masonite Corporation, a Delaware Corporation, having its principal sales office at Chicago, Illinois, hereinafter called "Masonite," and Armstrong-Newport Company, a Delaware Corporation, having a principal business office

at Pensacola, Florida, hereinafter called "Armstrong-Newport," witnesseth that:

Whereas, the parties hereto are about to enter into an agreement entitled "Agency Agreement and License Option" whereby Armstrong-Newport is constituted adel credere factor of Masonite for the sale of hardboard products throughout the Continental United States and Hawaii; and

Whereas, Armstrong-Newport desires to execute said agreement provided it be construed in accordance herewith;

Now, therefore, in consideration of Armstrong-Newport executing the said Agency Agreement and License Option, and as an inducement therefor, the parties agree that if, when and as said Agency Agreement and License Option become operative, it shall be construed in accordance with the following:

1. (a) The words "Letters Patent" in paragraph 4 of said Agency Agreement and License Option shall be construed to include applications for Letters Patent, together with additional Letters Patent and/or applications therefor relating to hardboard products and the manufacture thereof.

(b) The word "products" in the third from the last line thereof shall include prices and discounts.

2. (a) The list prices and terms of sale referred to in the second sub-paragraph of paragraph 5 of said Agency Agreement and License Option shall be those list prices and terms of sale shown in Exhibit A as it then exists.

(b) New prices and new terms established in accordance with the second sub-paragraph of paragraph 5 shall become part of Exhibit A when the new prices and new terms become effective.

3. The "price list or terms of sale" referred to in line 5 of the second sub-paragraph of paragraph 6 of said Agency Agreement and License Option shall be deemed to be those in effect at the date of the sale.

4. In Section 8 of said Agency Agreement and License Option, the following shall apply:

(a) The words "list price" shall be understood to be the then current Manufacturers' Dealers carload list prices F. O. B. cars or trucks Manufacturer's factory, and the applicable list price shall be governed by the provisions of Section 5 of said Agency Agreement and License Option.

(b) The word "One-half" as used in the first line of said Section 8 shall be understood to be a minimum amount and that the Agent may advance amounts in excess thereof when and if it shall elect so to do.

(c) The shipment of a "long" as hereinafter defined shall be considered a shipment of a full board (forty-eight square feet) and shall be reported and paid for by the Manufacturer; when-

ever the Agent shall sell a "long" for the Manufacturer the remaining portion of the full board shall be the Agent's property and no further report or payment shall be required of it to the Manufacturer.

(d) The freight and transportation costs referred to in the second paragraph of Section 8 shall mean such costs incurred by the Manufacturer on behalf of the Agent.

(e) The words "excises and charges" in the third paragraph of Section 8 of said Agency Agreement and License Option are not to be construed as including any charge which may be incurred by the Agent which is properly chargeable to the Manufacturer.

5. The plant or plants referred to in Section 10 of the Agency Agreement and License Option mean plants of a reasonably permanent nature.

6. Masonite agrees that no right of cancellation shall accrue to it under Paragraph 15 of said Agency Agreement and License Option by reason of the failure of Armstrong-Newport to have ordered from Masonite at least one and a half million square feet of hardboard products for any six months' period until said Agency Agreement and License Option shall have been in effect nine months, at which time, the first six months' period for purposes of determining Masonite's right of cancellation thereunder shall commence.

7. In the event that Masonite has made or shall make any agency agreement with respect to the sale of any or all of its hardboard products, as defined in the said Agency Agreement and License Option, on terms or with provisions more favorable to the Agent than granted to Armstrong-Newport in said Agency Agreement then Armstrong-Newport shall be entitled to have the benefit of such more favorable terms or provisions. Masonite agrees to promptly supply Armstrong-Newport with copies of all agency agreements with respect to hardboard products. In event of any dispute arising between the parties as to the application of this paragraph, the same shall be determined by arbitration, as provided in Paragraph 20 of the said Agency agreement and License Option.

8. It is contemplated that the standard form of Agency Agreement and License Option may be revised as to phraseology in the interest of clarity and accuracy but there are no presently contemplated modifications of or alterations or additions contemplated therein or thereto other than such as are indicated in this agreement.

In witness whereof, each of the parties hereto have caused this agreement to be executed by a duly authorized officer as of the day and year first above written.

ARMSTRONG-NEWPORT COMPANY,
(Signed) By H. M. CLARKE, *Vice President.*
MASONITE CORPORATION,
(Signed) By JAMES P. GILLIES, *Vice President.*

356-D *Exhibit S-39*

EXHIBIT I-5—SUPPLEMENTAL AGREEMENT

This memorandum of agreement made this 25th day of June 1934, by and between Masonite Corporation, a Delaware Corporation, having its principal sales office at Chicago, Illinois, hereinafter called the "Manufacturer," and Wood Conversion Company, a Delaware Corporation, having its principal place of business at Cloquet, Minnesota, hereinafter called the "Agent," witnesseth, that

Whereas the parties hereto are about to enter into an agreement entitled "Agency Agreement and License Option" whereby Wood Conversion Company is constituted a *del credere* factor of Masonite Corporation for the sale of hardboard products throughout the Continental United States and Hawaii; and

Whereas Wood Conversion Company desires to execute said agreement provided that it be construed, modified, and supplemented in accordance herewith;

Now, therefore, in consideration of Wood Conversion Company executing the said "Agency Agreement and License Option," and as an inducement therefor, the parties hereto agree that if, when and as said "Agency Agreement and License Option" become operative, it shall be construed, modified, and supplemented in accordance with the following:

1. The Agent's acknowledgment of validity of the patents or applications in Schedule 1 of the Agency Agreement and License Option shall not be construed as binding the Agent to any admission as to priority or inventorship or other issue when such question may arise for determination in any interference proceeding involving a patent or application under the control of the Agent or in which the Agent has a bona fide interest.

2. In clause 9, line 3 of the printed copy of Agency Agreement and License Option, the word "sold" is hereby construed as—supplied by Manufacturer to the Agent and on which the Agent has made full payment to the Manufacturer less Agent's compensation—.

3. The percentage figures for the Agent's commission or compensation set forth in various brackets in printed clause 9 of the

Agency Agreement and License Option, or as duly modified from time to time are based upon the carload price to dealers for "longs," as set forth in Schedule A, as printed, or as duly modified from time to time.

4. The Manufacturer hereby agrees that it will, during the term of the agency agreement, and at all times thereafter, respect as a trade-mark any distinctive name, word, symbol or marking used by the Agent on, or as a designation of, the hard board sold under this agreement, by refraining from appropriation of the said indicia or of any colorable imitation thereof, and by refusing to provide any product under its control to any other agent, or to any other person, firm, corporation or association who shall appropriate the said indicia or any colorable imitation thereof for said product.

5. Whenever the Agent shall in good faith guarantee to take a specified quantity of the licensed products of the Manufacturer within a reasonable specified period, the Manufacturer hereby guarantees to deliver the said quantity within the said period, except when inability so to do shall be unavoidable because of conditions set forth in first paragraph of Clause 16 of the Agency Agreement and License Option. In the last paragraph of said Clause 16, the pro-rating thereof during the first six months' period of the license agreement shall be based upon the entire period since the signing of the license pro-rated to a six months' period.

6. In the event that any of the patents issued or to issue from the listing of Schedule I shall be construed in any court decision, and the benefit of any decision is accorded to any agent, it shall likewise be granted to the Wood Conversion Company.

7. In the event the Manufacturer shall make any agency agreement with respect to the sale of all or any of its hard board products, as defined in said Agency Agreement and License Option, on terms or with provisions more favorable to another agent than granted to Wood Conversion Company in said Agency Agreement and License Option, then Wood Conversion Company shall be entitled to have the benefit of such more favorable terms or provisions. The making by the Manufacturer of freight allowances to partially off-set geographical inequalities or the making of temporary concessions necessary to the settlement of litigation shall not be deemed to be provisions more favorable to any agent. The Manufacturer agrees to promptly supply Wood Conversion Company with copies of all other Agency Agreements and Supplemental Agreements. In event of any dispute arising between the parties hereto as to the application of this Paragraph 8, the same shall be determined by arbitration, as provided in printed Section 20 of the said Agency Agreement and License Option.

8. The sale by the Agent of "longs" to any builder, or owner of a vehicle used for transportation, in carlots, half carlots; and pool carlots or L. C. L. lots when processed; as prescribed by Masonite as to prices and quantities in their industrial price list on B and Better boards, shall not be regarded as in conflict with the spirit of the text of the entire Agency Agreement and especially of printed Article 10 of such Agency Agreement and License Option, if the board is to be used in the construction of a vehicle. The word "vehicle" is to be understood as including, among others, railroad cars, electric street railway cars, busses and boats and ships of every description, and any and all other constructions used for the purpose of transporting passengers, goods, or both.

9. The shipment of a "long" as defined in Agency Agreement shall be considered a shipment of a full board (forty-eight square feet) and shall be reported and paid for by the Agent; whenever the Agent shall sell a "long" for the Manufacturer the remaining portion of the full board shall be the Agent's property and no further report or payment shall be required of it to the Manufacturer.

10. In the event the Agent shall be required, upon the termination of the agreement, to purchase and pay for any products on consignment with the Agent and unsold, as provided in the third paragraph of printed Section 15 of the Agency Agreement and License Option, the purchase price of such products shall be the dealer prices in effect at the date the products were consigned to the Agent less a percentage equal to Agent's compensation in the event of sale.

11. The granting of the license to the Agent as set forth in Clause 1 of the Agency Agreement and License Option, shall constitute a waiver of any claim of the Manufacturer against the Agent for patent infringement which may possibly have occurred prior thereto, or which may occur subsequently thereto in the event the Agent may sell any stock on hand within three months of the signing of this Agreement, which may be of an infringing character.

In witness whereof each of the parties hereto has caused this agreement to be executed by a duly authorized officer as of the date and year first above written.

WOOD CONVERSION COMPANY,
(Signed) By H. H. IRVINE,
Vice President.

MASONITE CORPORATION,
(Signed) By JAMES P. GILLIES,
Executive Vice President.
(Signed) F. WEYERHAUSER, *Secretary.*

356–E *Exhibit S–41*

EXHIBIT I–11—SUPPLEMENTAL AGREEMENT

Memorandum of Agreement made this 2nd day of February 1935, by and between Masonite Corporation, a Delaware Corporation, having its principal sales office at Chicago, Illinois, hereinafter called Masonite and The Insulite Company, a Minnesota Corporation, having its principal business office at Minneapolis, Minnesota, hereinafter called Insulite, witnesseth:

Whereas, the parties hereto are about to enter into an agreement of even date herewith entitled Agency Agreement and License Option Whereby Insulite is constituted a del credere factor of Masonite for the consignment and sale of hard board products throughout continental United States and Hawaii, and

Whereas, Masonite now has pending a suit in equity on U. S. Patent No. 1,663,505, in the Northern District of Pennsylvania against the Faxon Lumber Company of Williamsport, Pennsylvania, a dealer of Insulite hard board, manufactured by Insulite and the parties are desirous of dismissing the said suit, and

Whereas, Insulite is manufacturing Insulite insulation board which it is desirous of selling to Masonite and which Masonite is desirous of purchasing, and

Whereas, the parties desire to execute said Agency Agreement, provided said Agency Agreement be construed in accordance herewith.

Now, therefore, the parties hereto agree as follows:

1. (a) The words "Letters Patent" in paragraph 4 of said Agency Agreement and License Option shall be construed to include applications for Letters Patent, together with additional Letters Patent and/or applications therefor relating to hard board products and the manufacture thereof.

(b) The word "Products" in the third from the last line thereof shall include prices and discounts.

2. (a) The list prices and terms of sale referred to in the second sub-paragraph of paragraph 5 of said Agency Agreement and License Option shall be those list prices and terms of sale shown in Exhibit A as it then exists.

(b) New prices and new terms established in accordance with the second sub-paragraph of paragraph 5 shall become part of Exhibit A when the new prices and new terms become effective.

3. The "price list or terms of sale" referred to in line 5 of the second sub-paragraph of paragraph 6 of said Agency Agreement and License Option shall be deemed to be those in effect at the date of the sale.

4. In Section 8 of said Agency Agreement and License Option, the following shall apply:

(a) the words "list price" shall be understood to be the then current Manufacturer's dealers carload list prices F. O. B. cars or trucks Manufacturer's factory, and the applicable list price shall be governed by the provisions of Section 9 of said Agency Agreement and License Option.

(b) The word "one-half" as used in the first line of said Section 8 shall be understood to be a minimum amount and that the Agent may advance amounts in excess thereof when and if it shall elect to do so.

(c) The shipment of a "long" as hereinafter defined shall be considered a shipment of a full board (forty-eight square feet) and shall be reported and paid for by the Agent; whenever the Agent shall sell a "long" for the Manufacturer the remaining portion of the full board shall be the Agent's property and no further report or payment shall be required of it to the Manufacturer.

(d) The freight and transportation costs referred to in the second paragraph of Section 8 shall mean such costs incurred by the Manufacturer on behalf of the Agent.

(e) The words "excises and charges" in the second paragraph of Section 8 of said Agency Agreement and License Option are not to be construed as including any charge which may be incurred by the Agent which is properly chargeable to the Manufacturer.

5. The plant or plants referred to in Section 10 of the Agency Agreement and License Option mean plants of a reasonably permanent nature.

6. Masonite agrees that no right of cancellation shall accrue to it under Paragraph 15 of said Agency Agreement and License Option by reason of the failure of Insulite to have ordered from Masonite at least one and a half million square feet of hardboard products for any six months' period until said Agency Agreement and License Option shall have been in effect nine months, at which time, the first six months' period for purposes of determining Masonite's right of cancellation thereunder shall commence.

7. In the event that Masonite has made or shall make any agency agreement with respect to the sale of any or all of its hardboard products, as defined in the said Agency Agreement and License Option, on terms or with provisions more favorable to the Agent than granted to Insulite in said Agency Agreement then Insulite shall be entitled to have the benefit of such more favorable terms or provisions. The making by Masonite of freight allowances to partially off-set geographical inequalities or the making of temporary concessions necessary to the settlement of litigation shall not be deemed to be provisions more favorable to the Agent. Masonite agrees to promptly supply Insulite with copies of all

agency agreements with respect to hardboard products. In event of any dispute arising between the parties as to the application of this paragraph, the same shall be determined by arbitration, as provided in Paragraph 20 of the said Agency Agreement and License Option as amended by paragraph 12 hereof.

8. It is contemplated that the standard form of Agency Agreement and License Option may be revised as to phraseology in the interest of clarity and accuracy but there are no presently contemplated modifications of or alterations or additions contemplated therein or thereto other than such as are indicated in this agreement.

9. Masonite agrees to adopt Insulite insulation board as a standard light colored insulation board and to purchase said board for sale at such place or places as may be geographically advantageous to Masonite. Insulite agrees to sell same to Masonite at the lowest price and on the best terms and conditions that are from time to time currently in effect.

10. Insulite agrees to sell to Masonite and Masonite agrees to purchase Insulite's multiplaten hydraulic press now located at International Falls, Minnesota, which is in use by Insulite for the manufacture of Insulite hardboard together with all necessary appurtenances and accessories thereof at a cost of $20,000. The parties will promptly check the physical property and make an inventory of the appurtenances and accessories and Insulite will give to Masonite a proper bill of sale covering same.

11. Masonite agrees to dismiss without prejudice said suit now pending in the Northern District of Pennsylvania. The parties agree that such dismissal shall be without prejudice to Masonite's contention that the hardboard manufactured by Insulite infringes Masonite's U. S. Patent No. 1,663,505, and without prejudice to the contention of Insulite that such process and product do not infringe.

12. Paragraph 20 of Agency Agreement and License Option is amended by inserting therein after the end of the second sentence thereof, the following: "If the two abritrators so appointed shall not appoint another arbitrator within thirty days from their appointment either party, upon not less than five (5) days notice to the other may apply to the Senior Acting Judge of the U. S. District Court of the Northern District of Illinois for the appointment of a third arbitrator, and the appointment so made by him shall be binding on the parties hereto."

13. In order to procure a dismissal of the suit above referred to paragraph 1 of said Agency Agreement and License Option shall not be construed to include an acknowledgement by Insulite of the validity of Patent No. 1,941,536, or Patent Application filed May 14, 1932, serial No. 611,431, or any patent or patents which may issue

thereon, and nothing in said Agency Agreement and License Option contained shall be construed as an acknowledgment by the Agent of the validity of any of the Letters Patent in Schedule 1 except during such time as said agreement shall be in force. The Agent agrees that during the life of said agency agreement and license option Masonite shall have the right to obtain a license without payment of royalty and without any admission of validity under any patent or patents that may issue by reason of applications owned by Insulite now on file which may issue with claims reading upon the product manufactured by Masonite under Boehm Patent No. 1,941,535 or application Serial No. 611,431, filed May 14, 1932.

14. This agreement shall continue in force so long as the said Agency Agreement between the parties hereto shall be in force and in the event of cancellation or termination thereof shall expire with said Agency Agreement between the parties hereto.

In witness whereof, each of the parties hereto have caused this agreement to be executed by a duly authorized officer as of the day and year first above written.

THE INSULITE COMPANY,
(Signed) By C. S. POPE,
Vice President.

MASONITE CORPORATION,
(Signed) By JAMES P. GILLIES,
Vice President.

356-F *Exhibit S-42*

SUPPLEMENTAL AGREEMENT OF FEBRUARY 8, 1935

Memorandum of Agreement Made this 8th day of February 1935 by and between Masonite Corporation, a Delaware corporation, having its principal sales office at Chicago, Illinois, hereinafter called "Masonite," and The Insulite Company, a Minnesota corporation, having its principal business office at Minneapolis, Minnesota, hereinafter called "Insulite," witnesseth:

Whereas, the parties hereto made and entered into two (2) certain agreements dated February 2, 1935, entitled respectively Agency Agreement and License Option, and Supplemental Agreement; and

Whereas, said Supplemental Agreement contains a paragraph numbered 10, reading as follows:

"Insulite agrees to sell to Masonite and Masonite agrees to purchase Insulite's multiplaten hydraulic press now located at International Falls, Minnesota, which is in use by Insulite for the manufacture of Insulite hardboard, together with all necessary appurtenances and accessories thereof at a cost of $20,000. The

parties will promptly check the physical property and make an inventory of the appurtenances and accessories and Insulite will give to Masonite a proper bill of sale covering same."
and

Whereas, the parties hereto desire to modify the provisions of said agreement above set out,

Now, therefore, the parties hereto do hereby agree as follows, to wit: That paragraph 10 of said Supplemental Agreement be and the same hereby is amended to read as follows:

"Insulite agrees to sell to Masonite and Masonite agrees to purchase Insulite's multiplaten hydraulic press now located at International Falls, Minnesota, which is in use by Insulite for the manufacture of Insulite hard board together with all necessary appurtenances and accessories thereof at a cost of $20,000. The parties will promptly check the physical property and make an inventory of the appurtenances and accessories. Forthwith, upon the execution of this agreement Masonite as purchaser hereunder shall be entitled to have and is hereby granted possession and control of said press and appurtenances and accessories. When Insulite shall tender to Masonite a good and sufficient bill of sale covering said property, the latter shall pay therefor the sum of $20,000."

In witness whereof this agreement has been executed by the parties hereto the day and year first above written.

THE INSULITE COMPANY,

[SEAL] (Signed) By C. S. POPE,

Vice President.

MASONITE CORPORATION,

[SEAL] (Signed) By JAMES P. GILLIES,

Vice President.

356-G *Exhibit S-43*

EXPORT AGREEMENT

This Agreement made this 2nd day of February 1935, by and between Masonite Corporation, a Delaware Corporation, having its principal sales office in Chicago, Illinois, hereinafter called Masonite, and The Insulite Company, a Minnesota Corporation, having its principal office at Minneapolis, Minnesota, hereinafter called Insulite, witnesseth:

Whereas, the parties hereto are about to enter into an agreement of even date herewith entitled Agency Agreement and License Option, and Supplemental contract thereto of even date therewith, and

Whereas, Insulite has been engaged in the manufacture of a Hard Fibre Board under the name of Insulite Hard Board, at

International Falls, Minnesota, and is exporting the same from United States to Europe, and Masonite claims, and Insulite denies that the manufacture in the United States of said Insulite Hard Board infringes Masonite U. S. Patent No. 1,663,505, and importation into and sale in Europe of said Insulite Hard Board infringes on Masonite's foreign patents listed in Appendix A hereof, and

Whereas, Masonite has granted exclusive rights to various persons in Europe under its said foreign patents, including among others, the firm of P. Wikstrom, Jr., of Sweden, which is now engaged in the manufacture in Sweden and sale of hard boards throughout the Northern portion of Europe, notwithstanding that Masonite's Swedish patent situation is unsettled, the Masonite application for patent in Sweden corresponding to said U. S. Patent No. 1,663,505 being now on appeal to the King's Court of Sweden, and

Whereas, under the existing conditions to facilitate settlement of litigation Masonite is willing to make temporary concessions as herein contained to Insulite for further manufacture and sale of Insulite Hard Board of the character and type heretofore manufactured by Insulite and for export only,

Now, therefore, the parties for and in consideration of the premises do agree as follows:

1. Masonite hereby leases to Insulite that certain multi-platen hydraulic press together with the appurtenances and accessories now on the premises of Insulite at International Falls, Minnesota, for a term of one year from date hereof and for such additional time as may be necessary to enable Masonite to furnish a supply of Hard Board under the provisions of Paragraph 3 of this agreement and does hereby permit Insulite to use said press for such uses as the latter may desire provided that to the extent that such press is used in the manufacture of Hard Board, such Hard Board shall be of the general character and type heretofore manufactured by Insulite and shall not be marketed or otherwise disposed of except by sale for export only; such permission to be without prejudice after the termination of this agreement to Masonite's claim of infringement and to Insulite's claim of non-infringement of U. S. Patent No. 1,663,505. Masonite agrees that it will make no claim for damage under any of its U. S. letters Patents by reason of Insulite's operation of the press for the manufacture or sale of Hard Board in export of the kind and character heretofore produced by Insulite manufactured on said press during the life of this agreement.

2. Insulite agrees that it will, at its own expense, keep said press, together with appurtenances and accessories in as good condition and repair as the same now are, and will promptly pay

and discharge any and all taxes that may be levied thereon or upon the use thereof.

3. In lieu of extending said lease and permit, Masonite may, at its option, on three months' written notice to Insulite, (A) sell to Insulite, Insulite's requirements of Hard Board of the type and character heretofore manufactured by Insulite or a type acceptable to Insulite for sale for export (not exceeding the capacity of the equipment referred to in paragraph 1 above) at prices and on terms and conditions then to be determined, necessary cost of packing, crating, etc., for export, all sales to be f. o. b. Laurel, Mississippi; or (b) may make arrangements for the purchase by Insulite at price and on terms to be agreed to by Insulite of Hard Board manufactured in Europe of either of the types aforesaid acceptable to Insulite for sale in export by Insulite. It is the intent hereof that during the life of this agreement, Insulite shall have a source of supply of Hard Board for its export business from one of the sources provided for in this agreement, not exceeding the capacity of the equipment referred to in paragraph 1 above. If, when and to the extent that Masonite shall secure for Insulite a supply of Hard Board of the kind and character heretofore produced by Insulite for its export business, Masonite agrees that it will indemnify Insulite against claims for infringement of Patents, U. S. or foreign, owned or controlled by Masonite by reason of manufacture and sale of such Hard Board in Insulite's export business.

4. It is understood that nothing herein contained permitting Insulite to manufacture on said press for export to Europe Hard Board of the kind and character heretofore manufactured by it, shall be understood to interfere with or in anywise prejudice any right of Masonite or of any of its foreign licensees, including P. Wikstrom, Jr., under any of Masonite's foreign patents during or after the life of this agreement, no license being granted to Insulite under any of said foreign patents.

5. Upon termination of this agreement, Masonite agrees to sell, and Insulite agrees to buy, said press and appurtenances, and said Insulite agrees to pay therefor the price at which the same was sold to Masonite, plus interest on said sum at the rate of five percent (5%) per annum from date of purchase by Masonite to date of sale to Insulite. The sale of said press by Masonite shall not be construed as the granting of any rights by Masonite under any of its patents or a waiver by it of any of its rights to enforce the same.

6. Masonite in case it sells Hard Board to Insulite for export shall not be liable for failure to deliver or delays in deliveries caused by strikes, riots, lock-outs, car shortages, fire, flood, storms and other acts beyond its control.

Masonite shall not be required to accept orders or deliver Hard Board products in excess of its manufacturing capacity, it being understood and agreed that Masonite is selling Hard Board products on its own account as well as through the Agent and other Agents.

In event orders are received in excess of Masonite's plant capacity, on any or more of its several products, it will pro rate among all sales of such product or products, including therein its direct sales, any necessary reductions, on the basis of the sales volume for the preceding six months' period of such product or products.

7. Nothing herein contained or acts in pursuance hereof shall be construed as an acknowledgment by Insulite of the validity of any of the Letters Patent of Masonite except during such time as this agreement shall be in force.

8. This agreement shall not be assignable without the consent of Masonite and shall be cancellable by either party on thirty days' notice on or after the expiration or cancellation of said Agency Agreement between the parties hereto dated February 2nd, 1935.

IN WITNESS WHEREOF, this agreement has been executed by parties hereto, the day and year first above written.

THE INSULITE COMPANY,
(Signed) By C. S. POPE.
MASONITE CORPORATION,
(Signed) By JAMES P. GILLIES.

APPENDIX A

Canadian Patent 267,048, December 28, 1926; Reissued as No. 286,373, January 8, 1929.
Finland Patent 13,282, March 22, 1927.
Norway Patent 48,723, February 11, 1926.
Germany Patent 433,061, January 30, 1926.
Cuba Patent 9,439, August 15, 1930.

SUPPLEMENTAL AGREEMENT OF FEBRUARY 8, 1935.

Memorandum of Agreement Made this 8th day of February 1935, by and between Masonite Corporation, a Delaware corporation, having its principal sales office at Chicago, Illinois, here-

inafter called "Masonite," and The Insulite Company, a Minnesota corporation, having its principal business office at Minneapolis, Minnesota, hereinafter called "Insulite," witnesseth:

Whereas, the parties hereto made and entered into a certain agreement dated February 2, 1935, entitled EXPORT AGREEMENT; and

Whereas, said Export Agreement contains a paragraph numbered 5, which reads as follows:

"Upon termination of this agreement, Masonite agrees to sell, and Insulite agrees to buy, said press and appurtenances, and said Insulite agrees to pay therefor the price at which the same was sold to Masonite, plus interest on said sum at the rate of five percent (5%) per annum from date of purchase by Masonite to date of sale to Insulite. The sale of said press by Masonite shall not be construed as the granting of any rights by Masonite under any of its patents or a waiver by it of any of its rights to enforce the same."

and

Whereas, the parties hereto desire to modify the provisions of said agreement above set out,

Now, therefore, the parties hereto do hereby agree as follows:

That paragraph 5 of said Export Agreement be and the same hereby is amended to read as follows:

"Upon termination of this agreement Masonite agrees to sell and Insulite agrees to buy said press and appurtenances and Insulite agrees to pay therefor the price paid therefor by Masonite, plus interest on said sum at the rate of 5% per annum from the date upon which the purchase price thereof shall have been paid by Masonite to Insulite. The sale of said press by Masonite shall not be construed as the granting of any rights by Masonite under any of its patents or a waiver by it of any of its rights to enforce the same."

In witness whereof this agreement has been executed by the parties hereto the day and year first above written.

THE INSULITE COMPANY,
(Signed) By C. S. POPE,
Vice President.

MASONITE CORPORATION,
(Signed) By JAMES P. GILLIES,
Vice President.

356–H *Exhibit S–44*

Printed from Proof Copy of June 30, 1936.

DEL CREDERE FACTOR'S AGREEMENT BETWEEN MASONITE CORPORATION AS THE MANUFACTURER AND THE CELOTEX CORPORATION AS DEL CREDERE FACTOR

Dated Oct. 29, 1936

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DEL CREDERE FACTOR'S AGREEMENT

This agreement, made this 29th day of October 1936, by and between Masonite Corporation, a Delaware corporation having its principal sales office at Chicago, Illinois (hereinafter called the "Manufacturer"), party of the first part, and The Celotex Corporation, having a principal business office at Chicago, Ill.

(hereinafter called the "Factor"), party of the second part, witnesseth that

Whereas, the Manufacturer is engaged in the manufacture and sale of hardboard products and desires to increase its sales of such products in the continental United States and the Hawaiian Islands; and

Whereas, the Factor desires to procure appointment to act as a del credere factor for the Manufacturer, on the terms and conditions hereinafter set forth;

Now, therefore, in consideration of the premises and of the mutual covenants and promises hereinafter set forth, it is hereby agreed by and between the parties hereto as follows:

SECTION 1. A list of the United States Letters Patent owned or controlled by the Manufacturer and under some or all of which the Manufacturer is manufacturing and selling its hardboard products as hereinafter defined is set forth in "Schedule I" annexed hereto and by reference made a part hereof.

List of Patents and Acknowledgment of Validity

So long as this Agreement shall remain in force the Factor expressly acknowledges the validity of each and all of said Letters Patent, but such acknowledgment of validity shall extend only to the application of the inventions of said Letters Patent to hardboard products and the manufacture thereof. The Factor agrees that during the term of this Agreement it will not, directly or indirectly, contest the validity or title of said Letters Patent or any of them in so far as the application of the inventions thereof is to hardboard products or the manufacture thereof, it being understood that for all other applications of the inventions of said Letters Patent and each of them the Factor shall be free to contest the validity and title of said Letters Patent.

Nothing in this Agreement shall prevent the determination by a court of competent jurisdiction of all questions of infringement, and (save where the Factor is estopped from denying validity or title hereby or otherwise) all questions of validity and title of any Letters Patent owned or controlled by the Manufacturer.

Appointment of Factor

SECTION 2. The Manufacturer hereby appoints The Celotex Corporation as a del credere factor and licenses it, subject and pursuant to the terms and conditions of this Agreement, to sell, throughout the continental United States and the Hawaiian Islands, such of the Manufacturer's hardboard products, as herein defined, as shall be sold or offered for sale from time to time

by the Manufacturer to the classes of trade to which the Factor is permitted to sell by the terms of this Agreement. The Factor agrees to use such diligence and effort as is deemed by it to be reasonable to promote and develop the sale of said hardboard products. The right of the Manufacturer to sell in competition with the Factor and to appoint other factors or agents shall not be deemed limited in any manner.

Agreement of Manufacturer To Fill Orders; If Orders Exceed Plant Capacity Then Prorated

SECTION 3. The Manufacturer agrees to manufacture its hardboard products, as herein defined, and make the same available in the respective standard sizes, as defined in Section 24, paragraph (f) hereof (including "longs" and "shorts" cut from certain of such standard sized products to the extent and subject to the conditions hereinafter provided), in such quantities as may be reasonably required to fill orders therefor received from the Factor; provided, that as to all Tempered hardboard products, whether colored or uncolored, and as to Special Concrete Form Board, if the Manufacturer shall at any time discontinue the manufacture and/or sale thereof to the classes of trade to which the Factor is permitted to sell as provided in this Agreement, then during the discontinuance of such manufacture and/or sale the Manufacturer shall not be obligated to make such product available to the Factor. Subject to the limitations of this Agreement, the Manufacturer agrees to promptly ship such hardboard products to the Factor or to a selling agent of the Factor upon orders received by it from the Factor. Subject to the limitations of this Agreement, the Manufacturer will also, at the Factor's request and pursuant to shipping instructions contained in or accompanying orders received from the Factor, ship hardboard products direct to Factor's customers.

However, the Manufacturer will accept orders from the Factor for shipments to the Factor's plant or warehouse or for shipment to a selling agent of the Factor or for shipment direct to a customer of the Factor in car lots only, but such quantity may be diversified between the various hardboard products; provided that with respect to any car routed to the Manufacturer's factory and which arrives partly loaded with the Factor's own merchandise of a character which is permitted to be combined in cars with the Manufacturer's hardboard products as hereinafter in this paragraph provided, the Manufacturer will fill orders for the loading in such car of such hardboard products as the Factor may specify, which quantity or quantities may be diversified as between the various hardboard products; and provided, further, that when

such partial loading of a car necessitates the unloading or readjustment in the car of merchandise already in the car and reloading or readjustment pursuant to Factor's instructions, the Manufacturer shall be entitled to make a charge at actual cost to it for labor performed and material used in the unloading and reloading or readjustment of such merchandise. Only fibre board manufactured primarily for the purpose of insulation and regularly sold by the Factor primarily for such purpose may be combined in cars with the Manufacturer's hardboard products.

It is further agreed that the Manufacturer can not reasonably be required to accept orders or deliver hardboard products which, together with its own sales requirements, exceed its normal manufacturing capacity, it being understood and agreed that the Manufacturer is engaged in selling its hardboard products on its own account as well as through other factors and agents. In event the aggregate sales demand for any hardboard product is in excess of the Manufacturer's normal manufacturing capacity for such hardboard product, it will, from month to month so long as such condition continues, prorate all shipments of such hardboard product, including therein its own direct sales, on the basis of the total volume of orders for such hardboard product or products actually received by the Manufacturer, including therein its own direct orders, during the preceding six months' period. During such time as the Factor's inventory of any hardboard product exceeds the Factor's previous two months' sales thereof, the Manufacturer shall not be required to ship such hardboard product to the Factor. The Manufacturer shall not be liable for failure to deliver, or for delays in deliveries, caused by strikes, riots, lockouts, acts of armed forces, car shortages, fire, floods, storms or other acts beyond its control.

Title to Hardboard Products; Factor to Pay Certain Costs and Charges

SECTION 4. In accordance with the del credere relationship hereby established, it is agreed that title to all of the Manufacturer's hardboard products shipped to the Factor or to any selling agent of the Factor shall remain in the Manufacturer until sold by the Factor or its selling agents, as the case may be. The Manufacturer will load its hardboard products on cars at Manufacturer's factory, and will also load on Factor's trucks at Manufacturer's factory provided that loading on trucks will be made only on order received from Factor for not less than a car lot quantity, it being agreed, however, that as to all shipments to the Factor or its selling agents (regardless of the method of transportation) the Factor shall be responsible for and shall pay, or

cause to be paid, all freight and transportation costs incurred on account thereof. The Factor further agrees to procure and carry, at its own expense, adequate insurance against the usual hazards incident to the transportation and storage of all hardboard products shipped to it or its selling agents, and all insurance policies for such coverage shall be made payable to the Manufacturer and the Factor as their respective interests may appear. As to hardboard products shipped direct to Factor's customers pursuant to shipping instructions contained in or accompanying Factor's orders, title shall pass f. o. b. cars at Manufacturer's factory, but all such products shall be invoiced to the Factor notwithstanding form of bill of lading. With respect to all such shipments direct to Factor's customers, the Factor shall be responsible for and shall pay, or cause to be paid, all freight and transportation costs incurred on account thereof.

In addition to freight and transportation costs and insurance as above provided, the Factor assumes and agrees to pay, or cause to be paid, and hereby indemnifies the Manufacturer against, all charges for storage and cartage on all hardboard products shipped to it or its selling agents and all expenses incurred in connection with the sale of hardboard products, it being understood and agreed that the Factor's commissions, as hereinafter provided, take into consideration the Factor's liability for all of the aforesaid costs, charges, and expenses.

The Factor also agrees to indemnify the Manufacturer against all damages resulting from injury to persons or property arising out of the handling by the Factor or by any selling agent of the Factor of Manufacturer's hardboard products, together with all costs and expenses, including reasonable attorney's fees, which the Manufacturer may incur by reason of any claim asserted for such damages.

Right of Manufacturer to Designate Selling Prices and Terms and Conditions of Sale; Notice of Increase or Decrease in Prices

SECTION 5. The Manufacturer shall from time to time designate, fix, and promptly communicate to the Factor the respective minimum selling prices, the respective maximum terms of sale and the conditions of sale at which the Factor shall sell the various hardboard products of the Manufacturer which the Factor shall be entitled to sell hereunder (except with respect to the sale of "shorts" as otherwise permitted by Section 9 hereof) to the respective classes of trade to which the Factor is permitted to sell as hereinafter set forth, and the right to change any of such selling prices, terms of sale or conditions of sale is vested exclusively in the Manufacturer. Said minimum selling prices to be observed by the Fac-

tor are, in each instance and as to each class of trade to which the Factor is permitted to sell, to be the prices appearing in the Manufacturer's current price lists applicable to such respective classes of trade, subject to the terms and conditions thereof, it being understood and agreed that said minimum selling prices, maximum terms of sale and conditions of sale need not be uniform throughout the entire territory within which the Factor is permitted to sell as herein provided, but that the Manufacturer shall have the right to establish territorial areas from time to time as it may determine, in respect of any which territorial area the minimum selling prices, maximum terms of sale and/or conditions of sale may differ from those in effect in other areas. However, the Manufacturer covenants and agrees that the respective minimum selling price, the respective maximum terms of sale and the conditions of sale so designated and fixed with respect to each of said hardboard products and with respect to each territorial area established by it shall be the respective minimum selling price, respective maximum terms of sale and conditions of sale at which the Manufacturer is at the time either making offers to sell or making sales of such respective hardboard products to its customers located in such respective territorial areas and belonging to the classes of trade corresponding to those to which the Factor may sell as aforesaid.

In the event that the minimum selling prices for wholesalers and jobbers or reserves as fixed and designated by the Manufacturer shall be less than 90 percent of the current list prices at the time in effect for dealers, then as to all sales made by the Factor to wholesalers and jobbers or to reserves while such lesser minimum selling prices are in effect, the Factor shall be allowed to retain, in addition to its regular current commissions on such sales as hereinafter in Section 7 provided, one-half of the difference between such minimum selling prices to wholesalers and jobbers or to reserves, as the case may be, and the aforesaid 90 percent of the current list prices for dealers.

The Manufacturer agrees to give the Factor not less than ten (10) days' notice of any increase in selling prices or of any less favorable terms of sale or conditions of sale. The increased selling prices and any less favorable terms of sale or conditions of sale shall take effect and apply to all shipments made after the tenth day following the day of the giving of notice by the Manufacturer to the Factor, excepting only (1) shipments to fill bona fide orders which shall have been actually received and accepted by the Factor prior to the receipt of such notice and either (a) actually filled by shipment from Factor's plant or warehouse within the thirty- (30) day period following the day of receipt by the Factor of such notice or (b) ordered to be shipped from Manufacturer's factory, pro-

vided that any such order shall direct actual shipment within said thirty- (30) day period, and (2) shipments to fill orders received by Factor from its customers prior to the effective date of such increase, which orders shall be filled by shipment within thirty (30) days from the effective date of such price increase or, if such orders are to be filled from Manufacturer's factory, shall have been ordered by the Factor prior to the effective date of such price increase with instructions for shipment within thirty (30) days from the effective date of such price increase. In event of any decrease in selling prices or of any more favorable terms of sale or conditions of sale, the Manufacturer agrees to give the Factor at least forty-eight (48) hours' notice thereof. The decreased selling prices and more favorable terms of sale or conditions of sale shall take effect and apply to (a) all hard-board products in the hands of the Factor or its selling agents or in transit from the Manufacturer to the Factor or its selling agents and unsold on the date such change became effective, (b) all hardboard products included in orders received from the Factor and not shipped by the Manufacturer prior to said date, and (c) all hard-board products shipped by the Factor or its selling agents to its or their customers or on the order of the Factor direct to its customers and not delivered on said date, provided evidence is furnished in the form of carriers expense bill indicating that such products were actually in transit and not delivered prior to said date. All notices of change in selling price or terms of sale or conditions of sale shall be given by the Manufacturer to the Factor by telegraph timed to be delivered in the normal course of telegraphic delivery as near as may be to the close of a business day, and Manufacturer agrees not to release such changes to its own sales organization or its own customers until at the opening of business on the first business day following the sending of such telegraphic notices. However, the Manufacturer shall not be liable to the Factor for any failure to deliver, or delay in delivery by, the telegraph company of any such notice.

Factor To Pay All Sales and Excise Taxes and Similar Charges

SECTION 6. Any sales tax, manufacturers' occupational tax or similar tax, excise, or charge imposed by law shall, to the extent authorized or permitted by law, be reflected in the selling price and noted on all price lists. The Factor shall be responsible for, shall pay, and hereby indemnifies the Manufacturer against, all sales taxes, manufacturers' occupational taxes, and all other similar taxes, excises, or charges which now or hereafter may be levied, imposed, or charged (whether by Federal, state, municipal, or other governmental authority) in respect of the sale, storage, or

handling of Manufacturer's hard-board products by the Factor, and the Factor shall be responsible for and make all reports required by public authorities in respect of such sales, storage, or handling.

Factor's Commissions; Remittances of Amounts Due Manufacturer; Option To Require Advances; Annual Settlement

SECTION 7. The Factor's compensation shall consist of (a) a current commission as hereinafter provided on each sale of the Manufacturer's hard-board products made by the Factor in accordance with the terms of this Agreement, (b) a graduated additional commission as hereinafter provided based on the aggregate square feet of all of the Manufacturer's hard-board products sold by the Factor in accordance with the terms of this Agreement during each calendar year and (c) the excess of the price at which the Factor may make sales of hard-board products over the carlot list price applicable to, and at the time of sale in effect with respect to, the hard-board products so sold.

The computation of the Factor's current and graduated additional commissions, the method and terms of remittance by the Factor to the Manufacturer for all hard-board products shipped by the Manufacturer on orders received from the Factor, and the method and terms of settlement of the Factor's commission on sales made by the Factor and its selling agents, shall be as follows:

(1) The current commission which the Factor shall be entitled to retain on account of sales made by the Factor or its selling agents of the respective hard board products of the Manufacturer shall be:

On 1/8" Untempered Presdwood, at the rate of 45% of the Manufacturer's current car lot list price to its dealers, the commission to be computed on the respective quantities included in each sale;

On 1/8" and 3/16" Temprtile and Quartrboard, at the rate of 40% of the Manufacturer's current car lot list price to its dealers for such respective products, the commission to be computed on the respective quantities included in each sale;

On 1/4" and 5/16" Untempered Presdwood, at the rate of 38% of the Manufacturer's current car lot list price to its dealers for such respective products, the commission to be computed on the respective quantities included in each sale;

On 3/16" Untempered Presdwood and DeLuxe Quartrboard, at the rate of 35% of the Manufacturer's current car lot list price to its dealers for such respective products, the commission to be computed on the respective quantities included in each sale;

On 1/8" Tempered Presdwood, at the rate of 45% of the afore-

said price for 1/8" Untempered Presdwood plus 10% of the excess of the Manufacturer's current car lot list price to its dealers for such Tempered Presdwood over the aforesaid price of 1/8" Untempered Presdwood, the commission to be computed on the respective quantities included in each sale;

On 3/16" Tempered Presdwood, at the rate of 35% of the aforesaid price for 3/16" Untempered Presdwood plus 10% of the excess of the Manufacturer's current car lot list price to its dealers for such Tempered Presdwood over the aforesaid price of 3/16" Untempered Presdwood, the commission to be computed on the respective quantities included in each sale;

On 1/4" and 5/16" Tempered Presdwood, at the rate of 38% of the aforesaid prices for 1/4" and 5/16" Untempered Presdwood, respectively, plus 10% of the excess of the Manufacturer's current car lot list price to its dealers for 1/4" and 5/16" Tempered Presdwood over the aforesad price for 1/4" and 5/16" Untempered Presdwood, respectively, the commission to be computed on the respective quantities included in each sale;

On black or other special colored Tempered Presdwood, in addition to the current commissions on uncolored Tempered Presdwood of like thickness as above set forth, at the rate of 10% of the excess of the Manufacturer's current car lot list price to its dealers for such black or other special colored Tempered Presdwood over the aforesaid current car lot list price to its dealers for uncolored Tempered Presdwood of like thickness, such excess to be computed on the respective quantities included in each sale;

On Special Concrete Form Board, at the rate of 35% of the Manufacturer's current car lot price to concrete form fabricators as shown by the Manufacturer's special separate fabricator's price list after first deducting from such price a special concrete form board processing charge equal to the difference between the Manufacturer's current car lot list price to its dealers for Untempered Presdwood and Tempered Presdwood of the same thickness as such Special Concrete Form Board, and in addition thereto 10% of the said differential in price between such Untempered and Tempered Presdwood, the commission to be computed on the respective quantities included in each sale.

However, if the aggregate footage of hard board products ordered from the Manufacturer during a six months' period ending at the close of any calendar month shall be less than one million five hundred thousand square feet, then beginning with orders received following the close of such calendar month and including all orders received until the end of such subsequent calendar month as the Factor's orders for the six months' period ending with such subsequent calendar month shall have increased to not less than one million five hundred thousand square feet, wherever

the above 45% rate of current commission would apply it shall be reduced to 35%, wherever the above 40% rate of current commission would apply it shall be reduced to 30%, wherever the above 38% rate of current commission would apply it shall be reduced to 28%, and wherever the above 35% rate of current commission would apply it shall be reduced to 25%; but the acceptance by the Manufacturer of remittances on such basis, as hereinafter required to be made by the Factor, shall not constitute a waiver of the Manufacturer's right of cancellation as provided in Section 16 hereof. For the purposes of this paragraph the words "ordered from the Manufacturer," "orders received" and "Factor's orders" means orders for immediate shipment actually received by the Manufacturer at its plant.

All commissions hereinabove provided for and all remittances hereinafter provided for shall be computed exclusive of any wrapping charge (except on Temprtile) and exclusive of all sales taxes, manufacturers' occupational taxes and other similar taxes, excises and charges on the sale of the various hard board products sold by the Factor or its selling agents and which are reflected in the selling price as provided in Section 6 hereof.

(2) Within twenty (20) days after the close of each calendar month, the Factor shall remit to the Manufacturer in Chicago exchange, a sum equal to the applicable Manufacturer's car lot list prices to its dealers on all hard board products of the Manufacturer (and as to Special Concrete Form Board the Manufacturer's car lot price to concrete form fabricators) which shall have been sold by the Factor and its selling agents during such calendar month less the current commissions due the Factor on account of such sales computed as provided in paragraph numbered "(1)" of this Section 7.

As an alternative to the method and terms of remittance above set forth, the Manufacturer shall have the option, to be exercised by it from time to time in its sole discretion, to require the Factor to advance to the Manufacturer in Chicago exchange, within twenty (20) days after the close of each calendar month in which hard board products shall have been shipped by the Manufacturer to the Factor or its selling agent, a sum equal to one-half (½) the difference between the applicable Manufacturer's car lot list prices to its dealers (and as to Special Concrete Form Board the Manufacturer's car lot price to concrete form fabricators) on the hard board products so shipped during such calendar month and the current commission to be due the Factor thereon when sold, computed as provided in paragraph numbered "(1)" of this Section 7. Notice of the Manufacturer's election to require such advance shall be given by the Manufacturer to the Factor not later than five (5) days following the close of the calendar month

to which such advance shall be applicable. When such notice has been so given such alternative method and terms of remittance shall thereafter continue to apply to each subsequent month until the Manufacturer shall give notice of discontinuance and its election to revert to the method and terms of remittance first above set forth. Whenever and as often as the Manufacturer shall adopt the foregoing alternative method of requiring advances, it shall also have the option, to be exercised by it at its sole discretion, to require the Factor to advance to the Manufacturer in Chicago exchange a sum equal to one-half (½) the difference between the applicable Manufacturer's car lot list prices to its dealers on hard board products shipped by the Manufacturer to the Factor or its selling agents prior to such aforesaid calendar month and then on hand and unsold and the current commission to be due the Factor thereon when sold computed as provided in paragraph numbered "(1)" of this Section 7. In each case the balance (being the difference between the Manufacturer's car lot list prices to its dealers in effect at the time of the sale and the Factor's current commission thereon, less the aforesaid advance) shall be remitted by the Factor to the Manufacturer in Chicago exchange within twenty (20) days after the close of the calendar month in which said hard board products shall have been sold by the Factor or its selling agents.

Notwithstanding the foregoing provisions of this paragraph (2), in the event the Factor shall direct the Manufacturer to ship any of its hardboard products direct to a customer or customers of the Factor, then the Factor, within twenty (20) days from the close of the calendar month in which said hardboard products were so shipped, shall account for and remit to the Manufacturer the entire difference between the applicable Manufacturer's car lot prices to its dealers (and as to Special Concrete Form Board the Manufacturer's car lot price to concrete form fabricators) and the current commission due the Factor thereon computed as provided in paragraph numbered "(1)" of this Section 7.

(3) In addition to the above, the Factor shall remit to the Manufacturer 90 percent of all applicable wrapping charges on hardboard products (except on Temprtile) wrapped by the Manufacturer, whether such wrapping charges be separately quoted on the Manufacturer's current dealers' price list or whether, as to such territorial area or areas as the Manufacturer may determine, such wrapping charges are included in the quoted prices of hardboard products in the Manufacturer's current dealers' price list applicable to such area or areas. On hardboard products wrapped by the Factor, the Factor shall be entitled to retain the entire wrapping charge.

(4) Said remittances to be made on account of sales as above provided for shall be due to the Manufacturer and shall be made during each month on or before the expiration of said twenty (20) day period whether or not the Factor shall have collected the selling price for the hardboard products so sold.

(5) The computation to be made for the purpose of complying with clause "(b)" of the first sentence of this Section 7 shall be in accordance with the graduated percentages shown for the respective footage brackets set forth in the following schedule, the applicable bracket to be determined by the aggregate square feet of all of the Manufacturer's hardboard products sold by the Factor pursuant to this Agreement during each calendar year, to wit:

	First bracket	Second bracket	Third bracket	Fourth bracket	Fifth bracket	Sixth bracket
	Up to five million sq. ft.	Over five million sq. ft. up to ten million sq. ft.	Over ten million sq. ft. and up to fifteen million sq. ft.	Over fifteen million sq. ft. and up to twenty million sq. ft.	Over twenty million sq. ft. and up to twenty-five million sq. ft.	Over twenty-five million sq. ft.
⅛" Presdwood	45%	47%	48%	49%	50%	52%
Quartrboard, ⅛" Temprtile, 5/16" Temprtile	40%	42%	43%	44%	45%	47%
¼" Presdwood, 5/16" Presdwood	38%	40%	41%	42%	43%	45%
5/16" Presdwood, DeLuxe Quartrboard, Special Concrete Form Board	35%	37%	38%	39%	40%	42%

As soon as practicable but not more than sixty (60) days after the close of each calendar year, provided that all sales for which accounting is to be made by the Factor hereunder for such calendar year have been duly reported to the Manufacturer and accounted for by the Factor, the Manufacturer will pay to the Factor a graduated additional commission determined as follows:

1st. The total number of square feet, surface measurement, of all hardboard products so sold by the Factor during such year shall be computed and the applicable footage bracket for such year thereby determined;

2nd. The commissions which would be payable on account of the respective hardboard products so sold at the respective percentage rates above set forth under such applicable footage bracket, computed on the respective car lot list prices to dealers and/or on the special separate fabricators' price list as to Special Concrete Form Board (excluding all wrapping, tempering, processing, and other special charges which carry a flat commission

only) in effect at the respective dates of sale of said products, shall then be determined;

3rd. The difference between the amount so determined under the foregoing clause "2nd" and the amount of the current commissions on the sale of said products retained by the Factor, as provided in paragraph numbered "(1)" of this Section 7, shall constitute the graduated commission to be paid by the Manufacturer to the Factor.

In all cases involving the accounting for sales of "longs" and "shorts" as required by Section 9 hereof, the phrases "respective quantities," "sold" and "each sale" shall, for the purpose of determining the applicable footage bracket, commissions due the Factor and the remittances due the Manufacturer, be construed on the basis of the accounting and remittances required by Section 9.

Standard Sized Boards; Additional Standard Sizes

SECTION 8. The Manufacturer shall not be obligated to manufacture or ship its various hardboard products, (a) if to Factor's customers, in a trimmed size larger than the standard size of 12′ in length by 4′ in width (with allowance for Manufacturer's current specification tolerance over or under) or (b) if to Factor itself, in a trimmed size larger than the standard size of 12′ in length (plus a saw kerf allowance of ½″ if so ordered) by 4′ in width (with allowance for Manufacturer's current specification tolerance over or under) or (c) as to both Factor's customers and the Factor itself, in thickness greater than the standard thickness for its respective hardboard products as set forth in "Schedule II" annexed hereto. On orders for shipment to the Factor only, the Factor may specify untrimmed boards, in which event Manufacturer will ship untrimmed standard sized boards which, for standard sized 4′ x 12′ boards, will be approximately from 12′1″ to 12′3″ in length by approximately 4′1″ to 4′2″ in width, it being understood that such hardboards will be shipped by Manufacturer without any cut and only as they come from Manufacturer's machines. In determining commissions due the Factor and remittances due the Manufacturer, all standard sized boards, whether furnished trimmed or untrimmed or with or without saw kerf allowance, shall be accounted for and settlement made on the basis of standard sized boards. However, if and during such time as the Manufacturer shall manufacture as a standard sized product and offer for sale, or sell, to the classes of trade to which the Factor is authorized herein to sell, any of its various hardboard products in sizes of different length, width, or thickness than shown on said "Schedule II," then the Manufacturer shall be obligated to make such additional standard sized hardboard

products available for sale by the Factor at such minimum selling prices, maximum terms of sale and conditions of sale as shall, from time to time, be designated and fixed by the Manufacturer (which shall be the same as those at which the Manufacturer is at the time offering to sell or selling said additional standard sized hardboard products to the classes of trade to which the Factor is permitted to sell), and with commissions fairly comparable to the commissions for hardboard products as provided for in Section 7 hereof.

Cutting of Certain Standard Sized Boards Into "Longs" and "Shorts"; Classes of Trade to Which Factor May Sell

SECTION 9. The Manufacturer agrees that, if requested by the Factor so to do at the time the Factor places an order for hardboards, it will cut its standard sized hardboards (except Presdwood of ¼" or more in thickness, whether Tempered or Untempered or colored or uncolored, and except Temprtile and Special Concrete Form Board) into not more than two pieces, provided that one of the two resultant pieces shall constitute a "long" as herein defined, or will if so ordered cut any standard sized board (except Special Concrete Form Board) into two "longs" of equal length. When the resultant "longs" are shipped by the Manufacturer, and/or when they are sold by the Factor, the Factor shall account for and remit to the Manufacturer as if the shipment and/or sale were a shipment and/or sale of the entire standard sized hardboards from which said "longs" were cut, whether or not the resultant "shorts," as herein defined, are shipped to the Factor or on its order to the Factor's customers. However, if such cutting would result in two "longs" such cutting will be done only on the condition that the Factor orders both resultant pieces shipped at the same time. In such event, whenever either of the resulting "longs" (whichever shall be sold first) shall be sold by the Factor it shall account for and make remittance to the Manufacturer as if the sale were a sale of the entire standard sized hardboard from which the "long" so sold was cut, and, if advances shall have been required to be made by the Factor to the Manufacturer on products shipped to the Factor and unsold by it, such advances shall be made on the basis of shipment of the entire standard sized board from which said "longs" were cut.

Such resultant "shorts" may be sold to any of the classes of trade to which the Factor is permitted to sell standard sized boards and "longs," but only at such minimum selling prices, maximum terms of sale and conditions of sale as shall, from time to time, be designated and fixed by the Manufacturer. The Factor may also sell such resultant "shorts" to classes of trade other than those classes

to which it is permitted to sell standard sized boards and "longs," and such sales of "shorts" to such other classes of trade may be made at prices to be determined by the Factor, and the Factor shall be under no obligation to account for the price or prices received. The Factor shall not be entitled to order "shorts" except to the extent that "shorts" are the resultant of an order for "longs." On all orders placed for hard boards to be shipped to the Factor's plant or warehouse and calling for cutting into "longs" and "shorts," the Factor shall order all such resultant "shorts" shipped at the same time as the "longs" are shipped. On all orders placed for hard boards to be shipped to any other destination than Factor's plant or warehouse and calling for the cutting into "longs" and "shorts," but not specifying shipment of all resultant "shorts," the Manufacturer will hold the resultant "shorts" for which shipment is not specified at its factory, provided that whenever resultant "shorts" shall have accumulated in excess of a car lot and the Manufacturer shall notify the Factor in writing to that effect, then within ten (10) days from the giving of such notice the Factor shall give shipping instructions for the excess so accumulated, and, failing so to do, the Manufacturer shall have the right to include such excess in any succeeding shipments of hard board products to Factor's plant or warehouse, provided that with respect thereto the car lot freight rate shall apply.

The Factor may, on its own account, cut standard sized hard boards which it may have on hand (except Presdwood of ¼" or more in thickness, whether Tempered or Untempered or colored or uncolored, and except Temprtile and Special Concrete Form Board) into two pieces, provided that one of such pieces shall constitute a "long" as herein defined, or may cut any standard sized board (except Special Concrete Form Board) into two "longs" of equal length. When such resultant "longs" are sold by the Factor it shall account for and remit to the Manufacturer as if the sale were a sale of the entire standard sized board from which said "longs" were cut. If such cutting by the Factor would result in two "longs," then whenever either of the resulting "longs" (whichever shall be sold first) shall be sold by the Factor, it shall account for and remit to the Manufacturer as if the sale were a sale of the entire standard sized hardboard from which the "long" so sold was cut.

The pieces resulting from the Factor's cutting as above permitted and constituting "shorts" as herein defined, if sold by the Factor to any of the classes of trade to which the Factor is permitted to sell standard sized boards and "longs," shall be sold only at such minimum selling prices, maximum terms of sale and conditions of sale as shall, from time to time, be designated and fixed by the Manufacturer and communicated to the Factor. The

Factor may also sell such resultant "shorts" to classes of trade other than those classes to which it is permitted to sell standard sized boards and "longs," and such sales of such resultant "shorts" to such other classes of trade may be made at prices to be determined by the Factor, and the Factor shall be under no obligation to account for the price or prices received.

The Factor may re-cut any resultant "shorts" which it may have on hand but only for the purpose of sale to the classes of trade to which the Factor is permitted to sell standard sized boards and "longs" at such minimum selling prices, maximum terms of sale and conditions of sale as shall, from time to time, be designated and fixed by the Manufacturer. Factor agrees that it will make no sale of re-cut "shorts" to any other classes of trade.

The Factor may make sales of said standard sized hard board products (except Special Concrete Form Board) and "longs" to the following classes of trade, but no others, to-wit:

(a) Dealers, as herein defined;

(b) Such departments and agencies of the United States Government as may be designated from time to time by the Manufacturer, which departments and agencies will be those to which the Manufacturer is currently selling or offering to sell its hardboard products;

(c) Wholesalers and jobbers, as herein defined; and

(d) Reserves, as herein defined.

Unless otherwise specially authorized by terms and provisions appearing in the Manufacturer's current price list to its dealers, and then only to the extent and on the terms and conditions so authorized, Special Concrete Form Board, if and when available for sale by the Factor, may be sold to concrete form fabricators only as herein defined, and only in not less than car lot quantities.

Sales and Inventory Reports by Factor

SECTION 10. The Factor agrees to report to the Manufacturer, on or before the 20th day of each calendar month during which this Agreement shall be in force and effect, on and pursuant to forms to be furnished by the Manufacturer, its sales for the preceding calendar month and its inventory of all hard board products on hand at the end of such preceding calendar month, such report and inventory to be in such reasonable detail as may be requested by the Manufacturer, but no such report shall require the disclosure of the names or addresses of Factor's customers except as to sales of Special Concrete Form Board with respect to which the conditions of sale imposed by the Manufacturer must be complied with. The Factor shall report and account for as though sold, all hard board products shipped to the Factor or its

selling agents and which shall have been damaged while in the possession of the Factor or its selling agents.

Trade-Marks on Boards; Reservation of Patent Notice

SECTION 11. If the Factor desires, the Manufacturer will, without extra cost except the actual cost to the Manufacturer of making the necessary dies and branding irons, brand or mark all hard boards with the Factor's name or trade-mark or trade name or other indicia which may be requested, if reasonable. The Factor expressly agrees that it will not infringe and that it will not knowingly permit any of its selling agents to infringe, the trade-mark "Masonite," or any of the trade names or trade-marks of the Manufacturer, including the trade-marks "Presdwood," "Quartrboard," "Temprtile," and "Tempered Presdwood." In the event that any of the Factor's reserves, wholesalers, jobbers, or dealers, without authorization of the Manufacturer, shall infringe any trade name or trade-mark of the Manufacturer, including those specifically mentioned above, the Factor, upon notification by the Manufacturer, agrees not to make any further sales of hardboard products to such reserve, wholesaler, jobber, or dealer until such reserve, wholesaler, jobber or dealer shall have ceased the unlawful use of said trade names or trade-marks. Nothing herein shall prevent the Factor's designation of the Manufacturer's tempered hard board products by the use of the word "tempered."

The Manufacturer will not infringe or knowingly permit any of its selling agents to infringe the trade-mark or trade-marks or any of the trade names of the Factor. In the event that any of the Manufacturer's reserves, wholesalers, jobbers or dealers, without authority of the Factor, shall infringe any trade name or trade-mark of the Factor, the Manufacturer, upon notification by the Factor agrees not to make any further sales of hard board products to such reserve, wholesaler, jobber or dealer until such reserve, wholesaler, jobber or dealer shall have ceased the unlawful use of said trade names or trade-marks.

The Manufacturer expressly reserves the right to mark all hard board products sold by the Factor with such patent notice as it may be advised by counsel is necessary for its protection, but no such marking shall in any manner deface the said hard board products nor in any manner differ from the method used by the Manufacturer in so marking said hardboard products sold directly by the Manufacturer to its own customers.

Accountant's Examination of Factor's Records and Accounts

SECTION 12. The Manufacturer shall have the right, from time to time, and at any reasonable time or times, through such firm

of accountants and auditors of recognized standing as it may select, to inspect and examine the physical inventory of hardboard products in possession or under control of the Factor and the books, records and accounts of the Factor relating to any of the transactions or matters which are the subject of this Agreement. The Factor agrees to keep complete and accurate records and books of account of all transactions coming within the purview of this Agreement. Such accountants and auditors shall not divulge to the Manufacturer any confidential or commercial information with respect to the Factor's business, provided, that if such accountants and auditors find any violation or violations of this Agreement, then they shall be entitled to report all such information, derived from such sources as they may deem necessary and proper in order to fully advise the Manufacturer of all facts pertinent thereto.

Standard and Quality of Products

SECTION 13. The Manufacturer agrees that all hardboard products which may be manufactured and shipped by it on orders of the Factor shall be good, workmanlike products of a character and quality equal to that currently manufactured by it for sale to its own direct customers. However, the Manufacturer's liability for noncompliance with this covenant shall be expressly limited to replacing, delivered to the Factor or its customers, according to the location of the product to be replaced, and without cost to the Factor or its customer, any defective hardboard products when the defect is one of manufacture.

SECTION 14. The Manufacturer's respective minimum selling prices as set forth on its current published dealers' price lists and as may be from time to time hereafter changed and designated by the Manufacturer are prices graduated both as to the class of trade to which the Factor is permitted to sell and as to quantities included in each sale made by the Factor. To the end that such prices shall at all times be observed and shall not, either directly or indirectly, be reduced, the Factor expressly agrees:

Manufacturer's Minimum Selling Prices not to be Reduced by use of Combined Bids or Other Unfair Methods of Competition

(a) That it will not submit any bid or quotation or make any sale, either directly or indirectly, below the current minimum selling prices or on more favorable terms of sale and conditions of sale for the particular hardboard products covered by said bid, quotation or sale in effect for the particular class of trade in which such purchaser or prospective purchaser is properly classified; and

(b) That it will not submit any bid or quotation or make any sale, either directly or indirectly, below the current minimum selling prices or on more favorable terms of sale and conditions of sale for the particular hardboard products included in the specific quantity covered by said bid, quotation, or sale in effect for such quantity bracket; and

(c) That if it shall publish a price list containing prices on other products (whether or not of its own manufacture) and on the Manufacturer's hardboard products, or submit a bid or quotation for, or make a sale of other products together with the Manufacturer's hardboard products, the prices for the Manufacturer's hardboard products shall in every instance be set forth entirely separate from and independent of the prices on such other products included in such price list, bid, quotation or sales invoice; and

(d) That each such price list, bid, quotation, and offer of sale shall be made in such form and manner that the purchase of products other than the Manufacturer's hard board products shall not be dependent upon or in any manner conditioned upon the purchase of the Manufacturer's hardboard products included therein or vice versa; and

(e) That it will not, either directly or indirectly, through discounts, rebates, quantity prices or any other special concession or allowance of any character whatsoever in respect of other merchandise which it may sell or offer to sell, reduce the current minimum selling prices in effect on Manufacturer's hardboard products, either as to class of trade or as to quantity bracket; and

(f) That it is the intent hereof that any quantity prices to dealers and any quantity prices or trade discounts to wholesalers and jobbers shall apply only where purchases are made by a dealer, a wholesaler or a jobber, as the case may be, for his own account, and that it will not knowingly permit or allow any quantity or trade discount where it has information that a purchase is being made by a dealer or wholesaler or jobber for the collective account of others. However, this subparagraph shall not be construed to apply to a sale to a bona fide reserve, as herein defined.

The foregoing subparagraphs (d) and (e) shall not be construed to extend to a quantity price, bid or quotation in those instances where the quantity on which such price, bid or quotation is based is made up in part of fibre boards manufactured primarily for the purpose of insulation and regularly sold by the Factor primarily for the purpose of insulation and in part of hardboard products, it being the intent hereof that such price, bid, or quotation may be at the regular established prices of each

such product applicable to the aggregate quantity of such products and to the class of trade to which such price, bid, or quotation is submitted.

Sales at Less Than Minimum Selling Price; Violation of Other Covenants; Unintentional Violations

SECTION 15. In the event the Factor shall knowingly make any sale of any of the Manufacturer's hardboard products at a price less than the then current minimum selling price designated by the Manufacturer for the hardboard products so sold, or on terms of sale or conditions of sale more favorable to the purchaser than those currently in effect (except with respect to the sale of "shorts" as otherwise permitted by Section 9 hereof), or to an unauthorized purchaser, or in violation of any other covenant herein contained, it shall account to the Manufacturer for the amount due the Manufacturer for such hardboard products as provided in Section 7 hereof, and in addition thereto shall pay the Manufacturer as and for liquidated damages the amount of $10.00 per thousand square feet of all hardboard products involved in such sale. However, the payment of such damages in respect of any such sale shall not deprive the Manufacturer of its right to cancel this Agreement by reason of such breach.

If the Factor shall unintentionally violate the foregoing provisions of this Section 15 by bona fide error of calculation or other bona fide error or mistake, then the Factor shall not be liable for the liquidated damages above set forth but shall account to the Manufacturer for the difference between the price at which said hardboard products were actually sold and the correct then current minimum selling price applicable to the quantity sold and to the class of trade to whom sold, together with interest on such difference at the rate of 6% per annum from the date on which the correct price should have been accounted for to the date on which it shall be actually accounted for, and the Manufacturer shall have no right to cancel this Agreement on account of such unintentional violation. If the Manufacturer does not agree that such violation was unintentional, the Factor shall have the right to have the question referred to arbitration as provided in Section 18 hereof, and the burden shall be on the Factor to prove that such violation was unintentional.

SECTION 16. The Factor shall have the absolute right to cancel and terminate this Agreement at any time upon giving to the Manufacturer not less than one hundred eighty days prior written notice of its election so to do.

Provisions for Cancellation

The Manufacturer shall have the absolute right to cancel and terminate this Agreement at any time forthwith by written notice to the Factor in event the Factor shall fail to have ordered from the Manufacturer at least one million five hundred thousand square feet of the Manufacturer's hardboard products for any six months' period. For this purpose the phrase "ordered from the Manufacturer" means orders for immediate shipment actually received by the Manufacturer at its plant during such six months' period.

The Manufacturer shall also have the absolute right to cancel and terminate this Agreement forthwith by written notice to the Factor in event the Factor shall become insolvent or be adjudicated a bankrupt, or in event the Factor shall make an assignment for the benefit of its creditors, or in event a receiver of the Factor or of substantially all of its assets and properties shall be appointed by a court of competent jurisdiction, or in event a petition for the reorganization of the Factor under Section 77B of the Bankruptcy Act shall be filed and approved.

In the event the Factor shall fail or refuse to keep or perform any of the other terms, conditions, or agreements on its part to be kept and performed as in this Agreement provided, the Manufacturer shall have, at its option, the right to cancel this Agreement in the manner following to wit: The Manufacturer shall give written notice to the Factor of its intent to cancel this Agreement on a date fixed in said notice, which date shall be not less than thirty (30) days from the said date the notice is mailed to the Factor, and said notice shall also specify the default or defaults for which the Agreement is to be cancelled. The Factor shall then have the opportunity to cure and make good the default or defaults so specified, and if each and every default so specified shall have been cured and made good prior to the date fixed in said notice, then said notice shall be deemed to have been withdrawn. If, however, the Factor shall fail to cure the specified defaults prior to the date specified in said notice, then said cancellation shall become effective and absolute on the date so fixed. However, nothing in this paragraph contained shall abridge the right of either party to arbitrate the issues involved in any claim of default or failure to cure the same.

In event of the cancellation of this Agreement as herein provided for, neither party shall be under any further obligation or liability hereunder, except to account for transactions occurring prior to such cancellation. Particularly, but without limiting the generality of the foregoing, the Factor shall have no claim against the Manufacturer for any amount which might otherwise become

due the Factor under the graduated percentages applicable to the aggregate footage for a calendar year under the Schedule set forth in Section 7 hereof, and settlement for all compensation due the Factor shall be made on the basis of the aggregate square feet of all hardboard products sold during such portion of the calendar year as shall have expired up to the effective date of such cancellation. In event of such cancellation, the Factor will as of the effective date thereof promptly account for all hardboard products which may have been sold by it and its selling agents and which have not been accounted for. As to hardboard products previously shipped to the Factor or any selling agent of the Factor and remaining unsold, it will sell the same at the then current minimum selling prices in effect, and duly account for such sales. However, at the option of the Manufacturer, it will return to the Manufacturer all or such portion of undamaged standard sized hardboards and "longs" as the Manufacturer shall request, and shall account for and pay over to the Manufacturer, in respect of such other hardboard products as the Factor or its selling agents may have on hand, as though such hardboard products were sold. As to all hardboard products so returned, the Manufacturer will refund to the Factor any advances which may have been made by the Factor to the Manufacturer on account thereof. The Manufacturer will also pay to the Factor reasonable cartage or handling charges incurred in making delivery of such hardboard products f. o. b. cars at Factor's plant or warehouse.

Defense Against Alleged Patent Infringement

SECTION 17. The Manufacturer hereby warrants that none of the hardboard products covered by this Agreement, when used for the general purposes for which such hardboard products are customarily designed or intended, will infringe any United States Letters Patent not owned or controlled, either directly or indirectly, by one of the parties hereto, and agrees to save harmless and protect the Factor, as well as the Factor's customers against any claim or demand based on an alleged infringement of any such other United States Letters Patent. Upon notice in writing given by the Factor to the Manufacturer, the Manufacturer agrees to appear and defend, at its own expense, any and all suits at law or in equity arising from such alleged infringement, provided always that the Manufacturer shall have full control of the defense of any such suit.

If it be finally adjudicated that any of the hardboard products covered by this agreement, or the manufacture thereof, infringe upon any claim of valid United Sates Letters Patent not owned or controlled, either directly or indirectly, by one of the parties

hereto, so as to impair the commercial production thereof by the Manufacturer, then this Agreement in so far as it applies to such hardboard products shall be deemed cancelled or suspended.

SECTION 18. Ayy controversies between the parties hereto as to the construction of any of the terms of this Agreement or the performance thereof by the parties shall be settled and finally determined in the City of Chicago, Illinois, by arbitration in the following manner:

Arbitration

The party desiring to submit any such difference or controversy to arbitration shall give written notice to the other party setting forth the point or matter to be arbitrated and designating its arbitrator, who shall be a person having no interest in the business of the party so appointing him. The party hereto so notified, within fourteen (14) days after the delivery of such notice, shall by written notice to the other party designate its arbitrator, who shall be a person having no interest in the business of the party so appointing him. If the party hereto first notified as aforesaid shall fail within said fourteen (14) day period to appoint its arbitrator, then the arbitrator appointed by the other party hereto shall act for both parties and his decision in writing when signed and filed with each of the parties hereto shall be final and binding upon both parties hereto as if he had been appointed as sole arbitrator by mutual agreement, and each party shall conform to and abide by said decision.

If two arbitrators are appointed as aforesaid and they shall agree on their decision within thirty (30) days after the delivery of the aforesaid notice appointing the second arbitrator, they shall make their decision in writing and such decision when signed and filed with each of the parties hereto shall be final and binding upon both parties hereto and each party shall conform to and abide by said decision. If two arbitrators are appointed as aforesaid and they shall fail to agree within thirty (30) days after the delivery of the aforesaid notice appointing the second arbitrator, they shall select a third arbitrator. In such event, the decision in writing of the three arbitrators, or of any two of them, when signed and filed with each of the parties hereto shall be final and binding on both parties hereto and each party hereto shall conform to and abide by said decision.

If two arbitrators are appointed as aforesaid and they shall fail to agree within the thirty (30) day period above provided for and they shall also fail for a further thirty (30) day period to appoint a third arbitrator, then upon not less than five (5) days written notice given by either arbitrator to the other, application may be made to the senior acting judge of the United

States District Court for the Northern District of Illinois for appointment by said judge of such third arbitrator, and the appointment made by said judge shall be binding upon the two arbitrators, the Manufacturer and the Factor.

This provision for arbitration shall be the sole basis under which arbitrators appointed pursuant hereto shall act, and no arbitration statute of the State of Illinois or of any other state shall be applicable to the procedure of the arbitrators or to the enforcement of any decision made by them, but each of the parties agree that such decision shall be fully as binding with respect to the particular matter or matters in controversy as if it were a decree or order of Court of competent jurisdiction in the premises. The decision of the arbitrators shall determine by whom and in what manner the costs and expenses of the arbitration shall be paid.

Factor's Right to Procure Nonexclusive License to Manufacture

SECTION 19. The Manufacturer agrees that at any time while the Factor is in good standing hereunder and at any time during the 180-day period referred to in Section 16 hereof, it will at the request of the Factor issue to the Factor a nonexclusive license to manufacture and sell hardboard products under the Letters Patent aforesaid, substantially in the form of the License Agreement annexed hereto and marked Schedule III, provided, however, that a down payment for such license shall be made according to the following schedule:

If the license is issued:

before December 31, 1936	$150,000
before December 31, 1937	125,000
before December 31, 1938	100,000
before December 31, 1939	75,000
before December 31, 1940	50,000
if issued thereafter	50,000

Cancellation of Prior Agency Agreement

SECTION 20. The parties hereto did heretofore enter into a certain "Agency Agreement and License Option" dated the 10th day of October 1933, under which the Factor was appointed a del credere agent of the Manufacturer. As of the date upon which this Agreement shall become effective, the above mentioned prior agreement, together with any supplemental agreement or agreements heretofore entered into, shall ipso facto terminate and be and become of no further force or effect, and each party thereto shall thereby be and become released and discharged of and from all liability and obligation of any kind whatsoever arising out of or connected with said prior agreement and all agreements supplemental thereto, or which might otherwise be claimed to arise

out of any act, or failure to act under, or alleged violation of, any term or provision of such prior agreement or any agreement supplemental thereto, provided, however:

(1) That any orders of the Factor on hand and unfilled by the Manufacturer on the date of the execution hereof shall be deemed and taken as orders under this Agreement and shall be filled and accounted for accordingly;

(2) That any hard board products heretofore shipped by the Manufacturer to the Factor or to any existing selling agent of the Factor and unsold on the date of the execution hereof shall be accounted for as if shipped under this Agreement;

(3) That all hard board products of the Manufacturer sold by the Factor since January 1, 1936, and up to the effective date of this Agreement shall be included in computing the aggregate square feet of hard board products sold during the calendar year 1936 for the purpose of determining the applicable footage bracket under Section 7 of this Agreement, provided that (1) the remittances required to be made by the Factor to the Manufacturer on account of such sales shall be made in accordance with the terms and provisions of said prior agreement, and the Factor shall be entitled to retain only the current commission computed at the percentage rates shown in the "First Bracket" of Paragraph 9 of said prior agreement, and (2) the graduated additional commission to be paid under this Agreement on account of said sales shall be determined by taking the difference between the amount retained by the Factor and the amount payable under the applicable footage bracket and percentage set forth in the table in Section 9 of said prior agreement;

(4) That as to that portion of the calendar year 1935, if any, for which full compensation has not been made to the Factor under the provisions of Paragraph 9 of the above mentioned prior agreement, the Manufacturer will, as soon as practicable, and not more than sixty (60) days after the effective date of this Agreement, compute the total number of square feet of all hard board products sold by the Factor from the 10th day of October 1935, to and including December 31, 1935, will apply to such total number of square feet the percentages of the aggregate footage bracket of said prior agreement which was applied to the determination of compensation to the Factor for the hard board products sold by the Factor during the year ended the 10th day of October 1935, and make settlement with the Factor for the amount so found to be due.

Reservation of Right to Sell to Motion Picture Industry

SECTION 21. Anything herein contained to the contrary notwithstanding, the Manufacturer reserves to itself the exclusive

right to sell its hard board products to the motion picture industry and nothing herein contained shall be construed to permit or authorize the Factor to make sales to any member of such industry, either directly or indirectly, and the price or prices made by the Manufacturer for sale to any member of such industry and sales made by the Manufacturer to members of such industry shall be deemed to be selling prices and sales to a class of customers in which the Factor has no interest. Such selling prices and sales shall not be within the provision of Section 5 hereof, and neither "Schedule II" annexed hereto nor any subsequent price lists designating and fixing selling prices shall be deemed to have any reference to, or any bearing upon, prices and sales made to members of said industry.

Right to Claim Benefit of More Favorable Sales Agreement Granted to Other Factors and Agents

SECTION 22. In the event that the Manufacturer shall make any sales agency agreement with respect to the sale in the continental United Statets or the Hawaiian Islands of all or any hard board products manufactured by it which may be sold by the Factor under and pursuant to this Agreement containing terms or provisions more favorable to the sales agent therein than those granted to the Factor by this Agreement, then the Factor herein shall be entitled to have the benefit thereof by electing so to do in the manner hereinafter set forth; provided, however, that no one of the following acts or matters shall be deemed to constitute terms or provisions more favorable to such agent or Factor, to wit:

(a) The making by the Manufacturer of freight allowances to any other agent or factor to partially offset geographical inequalities; or

(b) The making by the Manufacturer of special concessions necessary to the settlement of litigation (provided such concessions do not grant more favorable compensation to the agent or more favorable minimum selling prices, maximum terms of sale, or conditions of sale than those required to be observed by the Factor); or

(c) The inclusion of wrapping charges in the quoted prices or price lists applicable to a particular territorial area or areas as the Manufacturer may from time to time determine although not included in other territorial areas; or

(d) The granting to any del credere factor or agent of the right to sell hardboard products to the motion picture industry; or

(e) The continued exclusion of patent No. 1,941,536 from the list of patents the validity of which is acknowledged by The Insulite Company in the event that a new del credere factor's agree-

ment shall be entered into between the Manufacturer and said The Insulite Company.

For the purposes hereof, the Manufacturer agrees promptly to supply the Factor with a true and correct copy of all such sales agency agreements, including all supplements thereto or modifications thereof. The election by the Factor to claim the benefit of any such more favorable sales agreement shall be made by giving written notice to the Manufacturer of its intent so to do, but such election may only be made as to a more favorable sales agreement in force and effect at the time of giving such notice, and such claim of benefit shall be effective only from the date of giving such notice and not retroactively, and the scope and application thereof shall not be enlarged over the terms and provisions of such more favorable sales agreement. Either party may at any time in writing require that this Agreement shall be rewritten to incorporate therein all applicable sales agreements which the Factor may have theretofore elected as aforesaid to consider more favorable to it.

Manner of Giving Notice

SECTION 23. Except as otherwise herein provided with respect to telegraphic notices, any notice or communication provided herein to be given or sent to the Manufacturer shall be deemed to have been duly given or sent if made in writing and mailed by registered mail, postage prepaid, addressed to Masonite Corporation, 111 West Washington Street, Chicago, Illinois, or at such different address as the Manufacturer may hereafter in writing request. Any notice or communication provided herein to be given or sent to the Factor shall be deemed to have been duly given or sent if made in writing and mailed by registered mail, postage prepaid, addressed to The Celotex Corporation, 919 North Michigan Avenue, Chicago, Illinois, or at such different address as the Factor may hereafter in writing request. Any such notice so mailed and so addressed shall be deemed to have been duly delivered on the first business day following the actual mailing thereof.

SECTION 24. For all purposes of this Agreement and of the price lists to be made and published by the Manufacturer from time to time, unless the context shall otherwise require:

(a) The term "person" means any individual, copartnership, corporation or other business entity and any trustee or receiver who shall conduct the business of any of them;

(b) The phrase "continental United States" means the territory comprised in the forty-eight states of the United States of America, the District of Columbia and the territory of Alaska;

Definition of Terms

(c) The term "hardboard products" means the Manufacturer's products listed on "Schedule II" annexed hereto, including additional standard sized products if, and during such time as, the same shall be manufactured and sold or offered for sale by the Manufacturer to the classes of trade to which the Factor is permitted to sell, and being products covered by some one or more of the product claims in or manufactured under or pursuant to some one or more of the processes described and claimed in, some one or more of the patents listed in "Schedule I" annexed hereto, said products having a density in excess of 25 lbs. per cubic foot, having as their major constituent wood or woody material rendered substantially fibrous and being a homogeneous, hard, dense, and grainless material;

(d) The phrase "terms of sale" means discounts, the extent and terms of credit to be allowed, if any, and any other matters having to do with discounts, time of payment, and the terms of credit on which the Factor may make sales of hardboard products;

(e) The phrase "conditions of sale" means any regulation or restriction, other than prices and terms of sale, which may be imposed by the Manufacturer in connection with the sale or delivery of hardboard products, and which it also imposes and observes in connection with its own sales to the classes of trade to which the Factor is permitted to sell;

(f) The terms "standard size" and "standard sized," as applied to the Manufacturer's various hardboard products to be sold by the Factor, means a hardboard twelve feet in length by four feet in width (with allowance for Manufacturer's current specification tolerance over or under) and of one of the thicknesses in which such respective hardboards are manufactured as shown on "Schedule II" annexed hereto and by reference made a part hereof; provided that if the Manufacturer shall manufacture said hardboards for sale to the classes of trade to which the Factor is authorized herein to sell, in sizes of different length, width, or thickness than as shown on said "Schedule II," then such different size or sizes shall be deemed to be included within the meaning of "standard size" or "standard sized" as herein used; it being understood that the above phrase "shall manufacture * * * in sizes of different length," etc., means the original production of a hardboard and, except for original edge trimming to size, does not include any subsequent treatment or additional processing or cutting;

(g) The term "long" means a hardboard (a) of one of the following lengths, to-wit five feet, seven feet, eight feet, nine feet, or ten feet, and which results solely from the cutting into two

pieces of a standard sized hardboard (except Presdwood of ¼" or more in thickness both Tempered and Untempered and whether colored or uncolored, and except Temprtile and Special Concrete Form Board, unless cut by the Manufacturer for the classes of trade to which the Factor is permitted to sell), and (b) of the length of six feet resulting from the cutting into two pieces of a standard sized hardboard (except Special Concrete Form Board), when so cut by the Manufacturer at the special request of the Factor or when so cut by the Factor from such standard sized hardboard which it has on hand;

(h) The term "short" means a hardboard less than five feet in length which results solely from the cutting into two pieces of a standard sized hardboard (except Presdwood of ¼" or more in thickness, both Tempered and Untempered and whether colored or uncolored, and except Temprtile and Special Concrete Form Board) when such cutting is done by the Manufacturer pursuant to a special request of the Factor for "longs" or when "longs" are cut by the Factor from such standard sized hardboards which it has on hand;

(i) The term "car lot" means a quantity of hardboard products which shall be not less than the minimum number of square feet, surface measurement, set forth on the Manufacturer's current price list as constituting a car lot quantity;

(j) The term "L. C. L. lots" means a quantity of hardboard products less than a car lot as above defined, but which may in turn consist of such different subclassifications of minimum and maximum square feet, surface measurement, as may be set forth from time to time on the Manufacturer's current price list;

(k) The term "square feet," when used for the purpose of determining the Factor's commissions on sales and on aggregate footage sold during each year, or for the purpose of determining the aggregate footage ordered from or shipped by the Manufacturer, or sold during any given period of time, means the surface measurements of the standard sized hardboard products required to be used or shipped in the filling of such orders or shipments and determined by multiplying the length in feet by the width in feet, such measurement to be computed without reference to thickness;

(l) The phrase "for any six months' period" means any six consecutive months during the time this Agreement shall be in force and effect, so that the first six months' period shall begin on the effective date of this Agreement and shall end on the day prior to the corresponding date of the sixth month thereafter, and the second six months' period shall begin on the corresponding date of the second month during which this Agreement shall be in force and effect and end on the day prior to the corresponding

date of the seventh month during which this contract shall be in force and effect, and so on during the entire time this Agreement shall be in force and effect;

(m) A "dealer" means and shall be any person to whom the Manufacturer would, from time to time, sell its hardboard products at its current dealers' prices, terms and conditions, and who, unless subsequent modifications of the following requirements are made by the Manufacturer, shall be limited to a person who shall continuously maintain, for the sale of insulation products and building materials, a plant or plants adequately equipped for service to the public with office, storage yards, or warehouse kept open regularly during business hours and who maintains a sales service and a sufficient stock of general insulation products and other building materials to supply his share of the normal retail requirements of the community where such facilities are located;

(n) A "wholesaler" and a "jobber" shall be construed as synonymous terms and means and shall be any person to whom the Manufacturer would, from time to time, sell its hardboard products at its current prices, terms, and conditions to wholesalers and who, unless subsequent modification of the following requirements are made by the Manufacturer, shall be limited to a person (1) who is regularly engaged in the wholesale distribution of insulation products and building materials, (2) who normally purchases such materials in carload lots and makes such purchases for his own account, (3) who continuously maintains adequate warehouse and storage facilities, (4) who normally maintains on hand or has on order for immediate shipment at least one aggregate carload of insulation products and hardboard products, (5) who invoices and assumes entire credit responsibility in connection with all of his sales and has sufficient financial resources so to do, and (6) who shall have first been accepted and classified, but only so long as such person shall remain so accepted and classified, by the Manufacturer as a wholesaler or jobber to whom the Factor may sell the Manufacturer's hardboard products;

(o) A "selling agent" means and shall be limited to a person (1) who is regularly engaged in the sale or distribution of insulation products and building materials, and who shall have the exclusive right to represent the Factor in the sale of the Manufacturer's hardboard products in a designated territory, (2) to whom the Manufacturer's hardboard products will be shipped solely by the Factor, or by the Manufacturer on orders from the Factor with title thereto remaining in the Manufacturer until sold by such selling agent pursuant to the terms hereof, and (3) who shall have been appointed as such exclusive agent by written agreement between him and the Factor, which appointment shall have first

been approved, but only so long as such appointment shall remain approved, by the manufacturer;

(p) The term "reserve" means and shall be any person to whom the Manufacturer would, from time to time, sell its hardboard products at its current prices, terms, and conditions to reserves, and which, unless subsequent modification of the following requirements are made by the Manufacturer, shall be limited to a company incorporated under the laws of a state of the United States, with a capital structure the ownership of which is distributed among a group of dealers doing business within the continental United States only, and which company has for its purpose the purchase of building and insulation products for resale at wholesale only to its dealer members and other dealers doing business in the continental United States, and recognized and approved, but only as long as it shall remain so recognized and approved, by the Manufacturer as a reserve supply company;

(q) A "concrete form fabricator" means and shall be limited to a person who (1) fabricates and builds concrete forms to specifications, (2) purchases his form material for such fabrication in not less than carlots only, and (3) uses such concrete forms in construction work or sells or rents ch concrete forms to, or for use by, a contractor engaged in construction work;.

(r) The term "list price(s)" means the respective current prices fixed by the Manufacturer from time to time for each of its standard sized hardboard products as shown in the Manufacturer's carlot price list to its dealers, such present list prices appearing on "Schedule II" annexed hereto; provided that wherever the phrase "list price to its dealers" or "current dealer's list price" or other like phrase would otherwise be applicable to Special Concrete Form Board, such phrase shall be taken and deemed to mean the Manufacturer's current price to concrete form fabricators as shown by special separate fabricator's price list, or by special fabricator's price separately shown on its dealer's price list;

(s) The term "minimum selling price(s)" as applied to dealers means the Manufacturer's current prices for its various hardboard products in standard sizes, "longs" and "shorts" and in various quantity brackets appearing in its dealers' price list as determined and published by the Manufacturer from time to time, and as applied to other classes of trade means the prices appearing on its current dealers' price list as aforesaid, less the maximum discounts fixed by the Manufacturer from time to time for the respective classes of trade to which the Factor is permitted to sell; provided that said term as applied to Special Concrete Form Board means the Manufacturer's current carlot price to concrete

form fabricators as determined by the Manufacturer from time to time and shown on its special separate fabricator's price list, but as to sales made through dealers or through wholesalers and jobbers, if and when permitted, means less such maximum discounts, if any, to dealers and to wholesalers and jobbers respectively, as may be specially stated on Manufacturer's current dealers' price list, or Manufacturer's separate price list for wholesalers and jobbers, as the case may be.

The Manufacturer agrees that it will not, directly or indirectly, use the power of acceptance, approval, and classification as set out in subparagraphs (n), (o), and (p) hereof, for the purpose or with the intent of diverting customers or business from the Factor to the Manufacturer or from one factor to another factor.

Right of Assignment

SECTION 25. This Agreement shall not be assignable by the Factor, except with the express written consent of the Manufacturer first had and obtained. However, the Manufacturer will consent to the assignment of the rights hereunder to such person, firm, or corporation as shall acquire all or substantially all of the assets and going business of the Factor, provided such assignee shall in writing assume all obligations of the Factor hereunder and agree to be bound by all the terms and provisions hereof.

Term of Agreement

SECTION 26. Except as herein otherwise provided, this Agreement shall continue in effect until the expiration of the term of that one of the United States Letters Patent listed on "Schedule I" annexed hereto having the longest unexpired term yet to run.

Law Governing Agreement

SECTION 27. This Agreement is executed and delivered at Chicago, Illinois, and the construction thereof shall be governed by the laws of the State of Illinois.

In witness whereof, said party of the first part has caused this Agreement to be signed in its corporate name by its President or a Vice President thereunto duly authorized and its corporate seal to be hereto affixed, attested by its Secretary or an Assistant Secretary, and the party of the second part has caused this Agreement to be signed in its corporate name by its President or a Vice President thereunto duly authorized and its corporate seal to be hereto

affixed, attested by its Secretary or an Assistant Secretary, all in duplicate and all as of the date and year first written.

MASONITE CORPORATION,
(Signed) By R. G. WALLACE,
Vice President,
Party of the First Part.

Attest:
(Signed) E. L. SABERSON, *Asst. Secretary.*

THE CELOTEX CORPORATION,
(Signed) By B. G. DAHLBERG,
President,
Party of the Second Part.

Attest:
(Signed) CHAS. G. R. MODES, *Secretary.*

SCHEDULE I—UNITED STATES PATENTS

Patent No.	Date	Title and Subject Matter
1,383,370	7/5/21	Process of Splitting Mica. (Bancroft,)
1,485,894	3/4/24	Apparatus for Manufacturing Pulp Articles. (Sutherland.)
1,506,789	9/2/24	Apparatus for Drying Pulp Products. (Sutherland.)
1,548,135	8/4/25	Refining Engine. (Gamble.)
1,578,609	3/30/26	"Process and Apparatus for Disintegration of Wood and the Like." The original explosion patent.
1,655,618	1/10/28	"Apparatus for and Process of Explosion Fibration of Lignocellulose Material." Improvements on 1,578,609.
1,663,504	3/20/28	"Press-Dried Structural Insulating Board and Process of Making same." Product such as "Quartrboard."
1,663,505	3/20/28	"Hard Grainless Fiber Products and Process of Making Same." Product such as "Presdwood."
1,767,539	6/24/30	"Process of Making Composition Boards and the Like and Apparatus Therefor." Process and apparatus for manufacture of product such as "Presdwood."
1,784,993	12/16/30	"Water Resistant Fiber Product and Process of Manufacture." Incorporating size in the water bath, and sized product.
1,824,221	9/22/31	"Process and Apparatus for Disintegration of Fibrous Material. Improvements on original explosion patent 1,578,609.

Patent No.	Date	Title and Subject Matter
1,844,861	2/9/32	"Process for the Manufacture of Vegetable Fiber Products." Improvements on 1,663,505, and use of chrome surface plates.
1,844,921	2/9/32	"Production of Hard Dense Bodies of Vegetable Fiber." Frosted surface pressing platen or member.
1,849,307	3/15/32	"Press Loader."
1,903,222	3/28/33	"Press." Movable screen in press.
1,923,105	8/22/33	"Process for Production of Non-Warping Fiber Boards." Humidifier process.
1,923,106	8/22/33	"Apparatus for Production of Non-Warping Fiber Boards." Division of 1,923,105, Humidifier Apparatus.
1,923,548	8/22/33	"Article Handling System." Also division of 1,767,539.
1,923,549	8/22/33	"Article Handling System." Also division of 1,767,539.
1,924,162	8/29/33	"Cut-off Machine."
1,941,536	1/2/34	"Hard Vegetable Fiber Product High Strength and Process of Making Same." Tempering of "Presdwood" or the like.

SCHEDULE II

1. List of standard sized hardboard products being manufactured by the Manufacturer.

	Commercial thickness		Width		Length
Presdwood, Tempered and Untempered	1/8"	x	4'	x	12'
Presdwood, Tempered and Untempered	3/16"	x	4'	x	12'
Presdwood, Tempered and Untempered	1/4"	x	4'	x	12'
Presdwood, Tempered and Untempered	5/16"	x	4'	x	12'
Black Tempered Presdwood	1/8"	x	4'	x	12'
Black Tempered Presdwood	3/16"	x	4'	x	12'
Black Tempered Presdwood	1/4"	x	4'	x	12'
Black Tempered Presdwood	5/16"	x	4'	x	12'
Quartrboard	1/4"	x	4'	x	12'
DeLuxe Quartrboard	1/4"	x	4'	x	12'
Temprtile	1/4"	x	4'	x	12'
Temprtile	3/16"	x	4'	x	12'
Special Concrete Form Board	3/16"	x	4'	x	12'
Special Concrete Form Board	1/4"	x	4'	x	12'
Special Concrete Form Board	5/16"	x	4'	x	12'

NOTE.—Black Tempered Presdwood and Special Concrete Form Board, although being presently manufactured, are special products and will be available only when in stock, but when in stock will be available to Factor as well as Manufacturer, but only for sale by the Factor to the classes of trade to which the Factor is permitted to sell under the Agreement to which this Schedule is annexed.

2. List of standard sized hardboard products which will be cut into "longs" and resultant "shorts" by the Manufacturer at the request of the Factor, and the respective lengths into which same will be cut.

1/8" and 3/16" Presdwood, Tempered and Untempered, Quartrboard and DeLuxe Quartrboard, all 4' x 12', will be cut as follows:

Into "longs," 4' x 8', 4' x 9' and 4' x 10'

Into resultant "shorts," 2' x 4', 3' x 4' and 4' x 4'

The above mentioned 1/8" and 3/16" Presdwood, Tempered and Untempered, Quartrboard and DeLuxe Quartrboard, all 4' x 12', will also be cut into 4' x 5' "longs" and resultant 4' x 7' "longs," subject to the special terms and conditions of the Agreement to which this Schedule is annexed.

Any standard sized hardboard product (except Special Concrete Form Board) will on request be cut into 4' x 6' lengths and two of such 4' x 6' lengths will be treated as the equivalent of one 4' x 12' standard sized board, both lengths being taken by the Factor when so requested to be cut.

3. Manufacturer's current minimum car lot quantities and current list prices to dealers on the basis of which, until changed by the Manufacturer, the del credere Factor's commissions will be computed as provided in Section 7 of the Agreement to which this Schedule is annexed.

	Minimum car lot Quantity sq. ft.	Dealer's car lot list prices per M sq. ft.
Untempered Presdwood:		
1/8" x 4' x 12'	56,000	$42.00
3/16" x 4' x 12'	40,000	54.00
1/4" x 4' x 12'	28,000	75.00
5/16" x 4' x 12'	24,000	100.00
Tempered Presdwood:		
1/8" x 4' x 12'	56,000	52.00
3/16" x 4' x 12'	40,000	64.00
1/4" x 4' x 12'	28,000	85.00
5/16" x 4' x 12'	24,000	110.00
Black Tempered Presdwood:		
1/8" x 4' x 12'	56,000	62.00
3/16" x 4' x 12'	40,000	79.00
1/4" x 4' x 12'	28,000	105.00
5/16" x 4' x 12'	24,000	135.00
Quartrboard:		
1/8" x 4' x 12'	56,000	30.00
DeLuxe Quartrboard:		
1/4" x 4' x 12'	56,000	42.00
Temprtile:		
1/8" x 4' x 12'	56,000	70.00
3/16" x 4' x 12'	40,000	90.00

4. Manufacturer's current minimum car lot quantities and current special separate price to fabricators, on the basis of which, until changed by the Manufacturer, the del credere Factor's commissions will be computed on Special Concrete Form Board as provided in Section 7 of the Agreement to which this Schedule is annexed.

	Minimum car lot quantity square feet	Fabricators car lot price per M square feet
Special Concrete Form Board:		
3/16" x 4' x 12'	37,500	$52.00
1/4" x 4' x 12'	28,000	65.00
5/16" x 4' x 12'	22,500	85.00

NOTE.—The foregoing list prices do not include wrapping charges, except on Temprtile. Wrapping charges, except on Temprtile, will be $1.00 extra per M square feet. The foregoing list prices on Temprtile include wrapping, as Temprtile is not shipped unwrapped.

NOTE.—The term "Square feet" as used herein means surface measurement determined by multiplying the length in feet by the width in feet, and without reference to thickness.

SCHEDULE III—LICENSE AGREEMENT

This Agreement, made this _____ day of _____, 19___, by and between Masonite Corporation, a Delaware corporation having its principal sales office at Chicago, Illinois (hereinafter called the "Licensor"), party of the first part, and _____, having a principal business office at _____ (hereinafter called the "Licensee"), party of the second part, witnesseth that

Whereas, the Licensor owns those certain United States Letters Patent listed on "Schedule A" annexed hereto and by reference made a part hereof, under which it is manufacturing and selling hardboard products; and

Whereas, the Licensee desires to manufacture and sell said products under and pursuant to a non-exclusive license to be granted to it;

Now, therefore, in consideration of the premises and of the mutual covenants and promises hereinafter set forth, it is hereby agreed by and between the parties hereto as follows:

SECTION 1. The Licensor hereby grants to the Licensee a non-exclusive license to manufacture and sell throughout the continental United States and the Hawaiian Islands hardboard products, as herein defined, under the United States Letters Patent listed on said "Schedule A" and under any and all patents which it may hereafter acquire, own or control or have the right to grant licenses under, and which cover improvements on said hardboard products or the processes of manufacturing hardboard products or machines for the manufacture thereof.

SECTION 2. The Licensor shall have the right to designate and fix from time to time the respective minimum selling prices, the respective maximum terms of sale, and the conditions of sale at which the Licensee shall be entitled to sell the various hardboard products which may be manufactured by it hereunder (a) to such dealers, wholesalers and jobbers, and reserves as comply with the requirements for such respective classes of trade as hereinafter provided, (b) to such departments and agencies of the United

States Government as may be designated from time to time by the Licensor and (c) to industrial users of hardboard products, and the right to change any of such selling prices, terms of sale or conditions of sale, and the respective differentials between the minimum selling prices of hardboard products sold to the respective classes of trade above mentioned is vested exclusively in the Licensor. Said minimum selling prices are in each instance to be the prices appearing on the Licensor's current price lists applicable to the respective classes of trade, subject to the terms and conditions thereof, it being understood and agreed that said minimum selling prices, maximum terms of sale and conditions of sale and the aforesaid differentials need not be uniform throughout the entire territory wherein Licensee is authorized to sell, but that the Licensor shall have the right to establish territorial areas from time to time as it may determine, in respect of any which territorial areas the minimum selling prices, maximum terms of sale, conditions of sale and/or the aforesaid differentials may differ from those in effect in other areas. However, Licensor agrees that the respective minimum selling prices, respective maximum terms of sale and conditions of sale and the respective differentials so designated and fixed with respect to each of said hardboard products and with respect to each territorial area established by it shall be the respective minimum selling prices, respective maximum terms of sale and conditions of sale and respective differentials at which the Licensor is at the time either making offers of sale or making sales of such respective hardboard products to its respective classes of trade located in such respective territorial areas, and that it will not depart therefrom to the detriment of the Licensee.

SECTION 3. The Licensor agrees to give the Licensee not less than ten (10) days' notice of any increase in selling prices or of any less favorable terms of sale or conditions of sale or of any change in the aforesaid differentials, and such increased selling prices, less favorable terms of sale, or conditions of sale and such change in differentials shall become effective after the tenth day following the day of the giving of such notice by the Licensor to the Licensee, except as to bona fide orders which have been actually received and accepted by the Licensee prior to the receipt of such notice and actually filled by shipment from the Licensee's plant or warehouse within the thirty (30) day period following the receipt by the Licensee of such notice. The Licensee covenants and agrees that it will not, during the ten (10) day period between the receipt of any such notice and the effective date of any such increased selling prices, less favorable terms of sale, or conditions of sale, or change in differentials, enter into any contract or accept any orders for the sale of hardboard products

unless all of the hardboard products to be covered by such contract or order are to be shipped within the thirty (30) day period following the effective date of such price increase or such less favorable terms of sale or conditions of sale, and are to be paid for upon the usual terms of payment.

In the event of any decrease in selling prices or of any more favorable terms of sale or conditions of sale, the Licensor agrees to give the Licensee at least forty-eight (48) hours' notice thereof. The Licensee shall have the right to apply such decreased selling prices and such more favorable terms of sale or conditions of sale to all bona fide, unfilled orders on hand prior to the receipt of such notice and to all sales of hardboard products in transit to its customers and not delivered on the date such change became effective.

All notices of change in selling prices or terms of sale or conditions of sale or of change in the aforesaid differentials shall be given by the Licensor to the Licensee by telegraph, timed to be delivered in the normal course of telegraphic delivery as near as may be to the close of a business day, and Licensor agrees not to release such changes to its own sales organization or its own customers until at the opening of business on the first business day following the sending of such telegraphic notices.

SECTION 4. The Licensee agrees to pay to the Licensor in Chicago exchange, on or before the 25th day following the close of each calendar month for all hardboard products manufactured by it under said patents or any of them during such calendar month a royalty of ten per centum (10%) on the Licensor's then current car lot list price to its dealers for the respective hardboard products so manufactured. With respect to any particular hardboard, the royalty shall be the same, whether such hardboard be manufactured in a size 4′ x 12′ or in a lesser size surface measurement. Licensee shall have no right to sell hardboard products of a larger surface measurement than 4′ x 12′ without the express consent of the Licensor and on a royalty rate to be agreed upon.

If, in any year, the royalties paid by the Licensee to the Licensor shall be less than Fifty Thousand Dollars ($50,000.00), the Licensee shall, within forty (40) days after the end of such year, pay any such deficiency over to the Licensor. The Licensee agrees to report to the Licensor (under oath, if requested) on or before the 25th day following the close of each calendar month, on and pursuant to forms to be furnished by the Licensor, the amount and kinds of all hardboard products manufactured by it during such preceding calendar month.

The Licensee agrees to keep complete and accurate records and books of account of all transactions or matters coming within

the purview of this License Agreement, and the Licensor shall have the right, from time to time, and at any reasonable time or times, through such firm of accountants and auditors of recognized standing as it may select, to inspect and examine the physical inventory of hardboard products manufactured hereunder and the books, records and accounts of the Licensee relating to any of the transactions or matters which are the subject of this license, but such accountants shall not divulge to the Licensor any confidential or commercial information with respect to Licensee's business, provided that if such accountants and auditors find any violation or violations of this License Agreement, then they shall be entitled to report all such information, derived from such sources as they may deem necessary and proper in order to fully advise the Licensor of all facts pertinent thereto.

SECTION 5. In the event the Licensee shall make sales of any hard board products manufactured by it hereunder at a price less than the then current minimum selling price designated by the Licensor for the hard board product so sold and for the class of trade to which the sale is made, or on terms of sale or conditions of sale more favorable to the purchaser than those designated by the Licensor and currently in effect, then the Licensee shall pay to the Licensor in respect of such sales the regular royalty due the Licensor based on the Licensor's then current car lot list price to its dealers for the products so sold, and in addition thereto, as and for liquidated damages, the amount of Ten Dollars ($10.00) per thousand (1,000) square feet, surface measurement, of all hard board products involved in such sale or sales. However, the payment of such damages in respect of any such sale shall not deprive the Licensor of its right to cancel this License for cause.

If the Licensee shall unintentionally violate this License Agreement in the manner set forth in this section by bona fide error of calculation or other bona fide error or mistake, then the Licensee shall pay to the Licensor the difference between the price at which said hard board products were actually sold and the list price thereof, and the Licensor shall have no right to cancel this License Agreement on account of such unintentional violation. If the Licensor does not agree that such violation was unintentional, the Licensee shall have the right to have the question referred to arbitration, as provided in Section 16 hereof, and the burden shall be on the Licensee to prove that the violation was unintentional.'

SECTION 6. Notwithstanding the penalties provided for in Section 5 hereof, and to the end that the minimum selling prices to be designated and fixed from time to time by the Licensor shall at all times be observed by the Licensee and shall not, either directly or indirectly, be reduced, Licensee expressly agrees:

(a) That it will not submit any bid or quotation or make any sale, either directly or indirectly, below the Licensor's current minimum selling prices or on more favorable terms of sale and conditions of sale for the particular hard board products covered by said bid, quotation or sale in effect for the particular class of trade in which the purchaser or prospective purchaser is properly classified; and

(b) That it will not submit any bid or quotation or make any sale, either directly or indirectly, below the Licensor's current minimum selling prices or on more favorable terms of sale and conditions of sale for the particular hard board products included in the specific quantity covered by said bid, quotation or sale in effect for such quantity; and

(c) That if it shall publish a price list containing prices on other products (whether or not of its own manufacture) and on hard board products manufactured under this License Agreement, or submit a bid or quotation for, or make a sale of, other products together with hard board products manufactured under this License Agreement, the prices for such hard board products shall in every instance be set forth entirely separate from and independent of the prices on such other products included in such price list, bid, quotation or sales invoice; and

(d) That each such price list, bid, quotation and offer of sale shall be made in such form and manner that the purchase of products other than hard board products shall not be dependent upon or in any manner conditioned upon the purchase of hard board products manufactured under this License Agreement and included therein; or vice versa; and

(e) That it will not, either directly or indirectly, through discounts, rebates, quantity prices or any other special concession or allowance of any character whatsoever in respect of other merchandise which it may sell or offer to sell, reduce the Licensor's current minimum selling prices in effect on hard board products manufactured under this License Agreement either as to class of trade or as to quantity bracket; and

(f) That it is the intent hereof that any quantity prices to dealers and any quantity prices or trade discounts to wholesalers and jobbers shall apply only where purchases are made by a dealer, a wholesaler or a jobber, as the case may be, for his own account, and that it will not knowingly permit or allow any quantity or trade discount where it has information that a purchase is being made by a dealer or wholesaler or jobber for the collective account of others. However, this subparagraph shall not be construed to apply to sales to a bona fide reserve, as herein defined.

The foregoing subparagraphs (d) and (e) shall not be construed to extend to a quantity price, bid or quotation in those in-

stances where the quantity on which such price, bid or quotation is based is made up in part of fibre boards manufactured primarily for the purpose of insulation and regularly sold by the Licensee primarily for the purpose of insulation and in part of hard board products manufactured under this License Agreement, it being the intent hereof that such price, bid or quotation may be at the regular current prices of each such product applicable to the aggregate quantity of such products and to the classes of trade to which such price, bid or quotation is submitted.

SECTION 7. The Licensee agrees that all of said hard board products embodying the inventions and improvements set forth and claimed in said patents and any applications for patents, or the package in which the same is shipped by the Licensee, shall be distinctly marked with the word "patent" or the words "patent applied for," as the case may be, together with the number of any such patents or applications specified by the Licensor, the claims of or under which may be embodied in said hard board products, and in connection with said marking the Licensee will further mark said hard boards or the package in which the same is shipped by the Licensee with the words "licensed under the above letters patent" or "licensed under pending applications for letters patent," as the case may be.

SECTION 8. As one of the considerations for the license and privilege hereby granted, Licensee agrees that it does, and, so long as this License Agreement shall continue in force, will continue to admit the validity of each and every of the Letters Patent listed in "Schedule A" annexed hereto and of patents which may be issued for improvements, but such acknowledgment of validity shall extend only to the use of said inventions with respect to hard board products; and that it will not, within the scope of the above limitation, at any time during the existence of this License Agreement, directly or indirectly, by itself or through or together with another or others, contest the validity of either or any of said Letters Patent, or the scope of the claims thereof or thereunder, or the title of the Licensor thereto.

Nothing in this Agreement shall prevent the determination by a court of competent jurisdiction of all questions of infringement and (save where the Licensee is estopped from denying the validity or title hereby or otherwise) all questions of validity and title of any Letters Patent owned or controlled by the Licensor.

SECTION 9. The Licensor hereby warrants that none of the hard board products covered by this License Agreement, when used for the general purposes for which such hard board products are customarily designed or intended, infringes or will infringe any United States Letters Patent not owned or controlled, either directly or indirectly, by one of the parties hereto, and agrees to

save harmless and protect the Licensee, as well as the Licensee's customers, against any claim or demand based on an alleged infringement of any such other United States Letters Patent. Upon notice in writing given by the Licensee to the Licensor, the Licensor agrees to appear and defend, at its own expense, any and all suits at law or in equity arising from such alleged infringement, provided always that the Licensor shall have full control of the defense of any such suit.

It is further agreed that if it be finally adjudicated that any patent or claim thereof is valid, and any of the hardboard products covered by this License Agreement constitute an infringement thereof or any of the valid claims thereof so as to impair the commercial production thereof by Licensee, then in any such events this Agreement in so far as it applies to such hardboard products as should be covered by such patents or claims thereof so held to be valid and infringed shall be cancelled or suspended.

SECTION 10. The Licensor agrees to afford reasonable patent protection, and to that end to diligently prosecute infringements of the said Letters Patent listed in "Schedule A" annexed hereto and any Letters Patent that may be granted for improvements, to the end that infringers may be enjoined from manufacturing and selling hardboard products embodying the inventions and improvements set forth in said Letters Patent or any of them.

In case in any suit upon any of said Letters Patent it shall be finally adjudicated that the process, product or machine therein complained of as an infringement of any of said Letters Patent, is not an infringement thereof, or that the manufacture, use or sale thereof by any party to such suit, other than the Licensor, cannot be enjoined, then the Licensee shall be permitted thereafter to manufacture, use and/or sell (as appropriate) such process, product or machine free from the restrictions of this Agreement and without payment thereunder of any license fees or royalties therefor in so far as said patent is concerned. It is understood that the provisions of this paragraph shall not be effective so long as the Licensor shall in good faith continue to litigate the question of validity and/or infringement of said patent.

SECTION 11. In event the Licensor shall grant any license under the patents listed in said "Schedule A," or any of them, for the manufacture and sale within the continental United States of said hardboard products to any other person, firm or corporation on more favorable terms or provisions to the Licensee therein than those granted to the Licensee by this Agreement, then the Licensee herein shall be entitled to have the benefit thereof.

SECTION 12. The Licensor will, upon request of the Licensee, furnish the Licensee with cooperation, advice and counsel to

assist the Licensee in making its plant or plants ready for the manufacture of hardboards embodying the inventions and improvements set forth and claimed in said Letters Patent, and will, upon request, furnish to the Licensee the advice and instructions of the Licensor's experts, together with such information as it possesses in respect of the purchase and cost of machines and appliances used in the manufacture of said hardboard products. In the event the Licensee shall so request and shall pay or agree to pay to the Licensor such reasonable attendant expenses for such services as Licensee may request, the Licensor then agrees to send its experts to the plant or plants of the Licensee to assist and instruct the Licensee or its agents or employees in the practical operation of such plant or plants.

SECTION 13. The Licensor agrees to disclose to the Licensee promptly all information and formulas which it now has relating to the process of making hardboard products or of machines or processes for making the same as set forth and claimed in said patents set forth in "Schedule A," together with a description of the machines or appliances which it now utilizes in the manufacture of said hardboard products.

The Licensee agrees to disclose to the Licensor promptly all information which it now has or may hereafter from time to time acquire relating to improvements in hardboard products as defined herein, the processes, or machines for making the same, and when requested by the Licensor to file patent applications therefor in such countries as the Licensor may designate, and to assign an undivided half interest therein to the Licensor, one-half the cost and expense thereof to be borne by the Licensor.

SECTION 14. The Licensee expressly agrees that it will not infringe and that it will not knowingly permit any of its selling agents to infringe the trade-mark "Masonite," or any name similar thereto, or any of the trade names or trade-marks of the Licensor, including the trade-marks "Presdwood," "Quartrboard," "Temprtile," and "Tempered Presdwood." In the event that any of the Licensee's reserves, wholesalers, jobbers or dealers, without authority of the Licensor, shall infringe any trade name or trade-mark of the Licensor, including those specifically mentioned above, the Licensee, upon notification by the Licensor, agrees not to make any further sales of hardboard products to such reserve, wholesaler, jobber, or dealer until such reserve, wholesaler, jobber or dealer shall have ceased the unlawful use of said trade names or trade-marks. Nothing herein shall prevent the Licensee's designation of tempered hardboard products manufactured by it under this License Agreement by the use of the word "tempered."

SECTION 15. In event the Licensee shall fail or refuse to keep or perform any of the conditions or agreements on its part to be kept and performed, then the Licensor shall have the right and option to terminate this Agreement by serving written notice of its intention so to do, which notice shall state the default or defaults for which the license is to be terminated. If within ninety (90) days after the receipt of said notice, the Licensee shall not have cured said defaults, said cancellation shall become absolute, but if within said ninety (90) day period the default or defaults complained of shall have been cured, then such notice shall be deemed withdrawn. The Licensor shall have the absolute right to cancel and terminate this Agreement forthwith by written notice to the Licensee in the event that the Licensee shall become insolvent or be adjudicated a bankrupt, or in the event the License shall make an assignment for the benefit of its creditors, or in the event a receiver of the Licensee or of substantially all of its assets and properties shall be appointed by a court of competent jurisdiction, or in the event a petition for a reorganization of the Licensee under Section 77B of the Bankruptcy Act shall be filed and approved. The term "Licensee" shall include any of its subsidiaries, as defined in Section 17 hereof. Cancellation shall not relieve the Licensee from any liability accrued up to the time of the termination of this License Agreement.

SECTION 16. All controversies between the parties hereto as to the construction of any of the terms of this Agreement or the performance thereof by the parties shall be settled and finally determined in the City of Chicago, Illinois, by arbitration in the following manner:

The party desiring to submit any such difference or controversy to arbitration shall give written notice to the other party setting forth the point or matter to be arbitrated and designating its arbitrator, who shall be a person having no interest in the business of the party so appointing him. The party hereto so notified, within fourteen (14) days after the delivery of such notice, shall by written notice to the other party designate its arbitrator, who shall be a person having no interest in the business of the party so appointing him. If the party hereto first notified as aforesaid shall fail within said fourteen (14) day period to appoint its arbitrator, then the arbitrator appointed by other party hereto shall act for both parties and his decision in writing when signed and filed with each of the parties hereto shall be final and binding upon both parties hereto as if he had been appointed as sole arbitrator by mutual agreement, and each party shall conform to and abide by said decision.

If two arbitrators are appointed as aforesaid and they shall agree on their decision within thirty (30) days after the delivery

of the aforesaid notice appointing the second arbitrator, they shall make their decision in writing and such decision when signed and filed with each of the parties hereto shall be final and binding upon both parties hereto and each party shall conform to and abide by said decision. If two arbitrators are appointed as aforesaid and they shall fail to agree within thirty (30) days after the delivery of the aforesaid notice appointing the second arbitrator, they shall select a third arbitrator. In such event, the decision in writing of the three arbitrators, or of any two of them, when signed and filed with each of the parties hereto, shall be final and binding on both parties hereto and each party hereto shall conform to and abide by said decision.

If two arbitrators are appointed as aforesaid and they shall fail to agree within the thirty (30) day period above provided for and they shall also fail for a further thirty (30) day period to appoint a third arbitrator, then upon not less than five (5) days' written notice given by either arbitrator to the other, application may be made to the senior acting judge of the United States District Court for the Northern District of Illinois for appointment by said judge of such third arbitrator, and the appointment made by said judge shall be binding upon the two arbitrators, the Licensor and the Licensee.

This provision for arbitration shall be the sole basis under which arbitrators appointed pursuant hereto shall act, and no arbitration statute of the State of Illinois or of any other state shall be applicable to the procedure of the arbitrators or to the enforcement of any decision made by them, but each of the parties agree that such decision shall be fully as binding with respect to the particular matter or matters in controversy as if it were a decree or order of Court of competent jurisdiction in the premises. The decision of the arbitrators shall determine by whom and in what manner the costs and expenses of the arbitration shall be paid.

SECTION 17. For all purposes of this License Agreement and of the price lists to be made and published by the Licensor from time to time, unless the context shall otherwise require:

(a) The term "person" means any individual, copartnership, corporation, or other business entity and any trustee or receiver who shall conduct the business of any of them;

(b) The phrase "continental United States" means the territory comprised in the forty-eight states of the United States of America, the District of Columbia, and the territory of Alaska;

(c) The term "hard board products" means those products covered by some one or more of the product claims in, or manufactured under or pursuant to, some one or more of the processes described and claimed in some one or more of the patents listed

in "Schedule A" annexed hereto or improvements thereof, said products having a density in excess of twenty-five ([redacted] pounds per cubic foot, having as their major constituent wood or woody material rendered substantially fibrous and being a homogeneous, hard, dense, and grainless material;

(d) The phrase "terms of sale" means discounts, the extent and terms of credit to be allowed, if any, and any other matters having to do with discounts, time of payment and the terms of credit on which the Licensee may make sales of hard board products;

(e) The phrase "conditions of sale" means any regulation or restriction, other than prices and terms of sale, which may be imposed by the Licensor in connection with the sale or delivery of hard board products to be manufactured under this License Agreement, and which the Licensor also imposes and observes in connection with its own sales to its respective classes of trade;

(f) The term "car lot" means a quantity of hard board products which shall be not less than the minimum of square feet, surface measurement, set forth on the Licensor's current price lists as constituting a car lot quantity;

(g) The term "L. C. L. lots" means a quantity of hard board products less than a car lot as above defined, but which may in turn consist of such different sub-classifications of minimum and maximum square feet, surface measurement, as may be set forth from time to time on the Licensor's current price list;

(h) A "dealer" means and shall be any person to whom the Licensor would, from time to time, sell its hard board products at its current dealers' prices, terms, and conditions and who, unless subsequent modifications of the following requirements are made by the Licensor, shall be limited to a person who shall continuously maintain, for the sale of insulation products and building materials, a plant or plants adequately equipped for service to the public with office, storage yards, or warehouse kept open regularly during business hours and who maintains a sales service and a sufficient stock of general insulation products and other building materials to supply his share of the normal retail requirements of the community where such facilities are located;

(i) A "wholesaler" and a "jobber" shall be construed as synonymous terms and means and shall be any person to whom the Licensor would, from time to time, sell its hard board products at its current prices to wholesalers and who, unless subsequent modifications of the following requirements are made by the Licensor, shall be limited to a person (1) who is regularly engaged in the wholesale distribution of insulation products and building materials, (2) who normally purchases such materials in carload lots and makes such purchases for his own account,

(3) who continuously maintains adequate warehouse and storage facilities, (4) who normally maintains on hand or has on order for immediate shipment at least one aggregate carload of insulation products and hard board products, (5) who invoices and assumes entire credit responsibility in connection with all of his sales and has sufficient financial resources so to do, and (6) who shall have first been accepted and classified, but only so long as such person shall remain so accepted and classified, by the Licensor as a wholesaler or jobber to whom the Licensee may sell the hard board products manufactured by it under this License Agreement;

(j) A "selling agent" means and shall be limited to a person (1) who is regularly engaged in the sale or distribution of insulation products and building materials, and who has the exclusive right to represent the Licensee in a designated territory in the sale of hard board products manufactured by the Licensee under this License Agreement, and (2) who shall have been appointed as a regularly established selling agent by written agreement between him and the Licensee, which appointment shall have first been approved, but only so long as such appointment shall remain approved, by the Licensor;

(k) The term "reserve" means and shall be any person to whom the Licensor would, from time to time, sell its hard board products at its current prices, terms and conditions to reserves, and which, unless subsequent modifications of the following requirements are made by the Licensor, shall be limited to a company incorporated under the laws of a state of the United States, with a capital structure the ownership of which is distributed among a group of dealers doing business within the continental United States only, and which company has for its purpose the purchase of building and insulation products for resale at wholesale only to its dealer members and other dealers doing business in the continental United States, and recognized and approved, but only so long as it shall remain so recognized and approved, by the Licensor as a reserve supply company;

(l) The term "list price(s)" means the respective current prices fixed by the Licensor from time to time for each of its standard sized hard board products as shown in its car lot price list to its dealers;

(m) The term "minimum selling price(s)" as applied to dealers and to industrial users means the Licensor's current prices for its various hard board products in standard sizes and other cut sizes and in the various quantity brackets as such sizes and quantities appear in its dealers' price list and price list to industrial users respectively, as determined and published by the Licensor from time to time, and as applied to other classes of trade means the prices appearing on its current dealers' price list as aforesaid,

less the maximum discounts fixed by the Licensor from time to time for such respective classes of trade;

(n) The term "subsidiary" means a duly organized corporation actually engaged in business and having its principal place of business in the continental United States, and the majority of the shares of which, having full voting rights for the election of directors, are owned or controlled by the Licensee.

SECTION 18. It is understood and agreed that the license hereby granted shall be personal to the Licensee, or to a subsidiary as above defined, and that neither said license nor any right thereunder or hereunder shall be sold, assigned, or transferred by the Licensee without the written consent of the Licensor, except to a corporation which may acquire all or substantially all of the assets and business of the Licensee and which corporation shall in writing assume all of the obligations of the Licensee under this License Agreement.

SECTION 19. Unless sooner terminated by the act of either party, this License Agreement shall continue in force during the life of that one of the patents listed in "Schedule A" having the longest unexpired term yet to run and/or patents for improvements, including all reissues, renewals, extensions, and improvements thereof.

In witness whereof, said party of the first part has caused this agreement to be signed in its corporate name by its President or a Vice President thereunto duly authorized and its corporate seal to be hereto affixed, attested by its Secretary or an Assistant Secretary, and the party of the second part has caused this Agreement to be signed in its corporate name by its President or a Vice President thereunto duly authorized and its corporate seal to be hereto affixed, attested by its Secretary or an Assistant Secretary, all in duplicate and all as of the date and year first above written.

MASONITE CORPORATION,

By ——— ———, *President,*

Party of the First Part.

ATTEST: ———, ———, *Secretary.*

By ——— ———, *President.*

Party of the Second Part.

Attest:

——— ———. *Secretary.*

SCHEDULE A—UNITED STATES PATENTS

Patent No.	Date	Title and Subject Matter
1,383,370	7/5/21	Process of Splitting Mica. (Bancroft.)
1,485,894	3/4/24	Apparatus for Manufacturing Pulp Articles. (Sutherland.)
1,506,789	9/2/24	Apparatus for Drying Pulp Products. (Sutherland.)
1,548,135	8/4/25	Refining Engine. (Gamble.)
1,578,609	3/30/26	"Process and Apparatus for Disintegration of Wood and the Like." The original explosion patent.
1,655,618	1/10/28	"Apparatus for and Process of Explosion Fibration of Lignocellulose Material." Improvements on 1,578,609.
1,663,504	3/20/28	"Press-Dried Structural Insulating Board and Process of Making Same." Product such as "Quartrboard."
1,663,505	3/20/28	"Hard Grainless Fiber Products and Process of Making Same." Product such as "Presdwood."
1,767,539	6/24/30	"Process of Making Composition Boards and the Like and Apparatus Therefor." Process and apparatus for manufacture of product such as "Presdwood."
1,784,993	12/16/30	"Water Resistant Fiber Product and Process of Manufacture." Incorporating size in the water bath, and sized product.
1,824,221	9/22/31	"Process and Apparatus for Disintegration of Fibrous Material." Improvements on original explosion patent 1,578,609.
1,844,861	2/9/32	"Process for the Manufacture of Vegetable Fiber Products." Improvements on 1,663,505, and use of chrome surface plates.
1,844,921	2/9/32	"Production of Hard Dense Bodies of Vegetable Fiber." Frosted surface pressing platen or member.
1,849,307	3/15/32	"Press Loader."
1,903,222	3/28/33	"Press." Movable screen in press.
1,923,105	8/22/33	"Process for Production of Non-Warping Fiber Boards." Humidifier process.
1,923,106	8/22/33	"Apparatus for Production of Non-Warping Fiber Boards." Division of 1,923,105, Humidifier Apparatus.

Patent No.	Date	Title and Subject Matter
1,923,548	8/22/33	"Article Handling System." Also division of 1,767,539.
1,923,549	8/22/33	"Article Handling System." Also division of 1,767,539.
1,924,162	8/29/33	"Cut-off Machine."
1,941,536	1/2/34	"Hard Vegetable Fiber Product High Strength and Process of Making Same." Tempering of "Presdwood" or the like.

356–I *Exhibit* S–45

SUPPLEMENTAL AGREEMENTS TO DEL CREDERE FACTORS' AGREEMENTS BETWEEN MASONITE CORPORATION AND ARMSTRONG-NEWPORT COMPANY, THE CELOTEX CORPORATION, HAWAIIAN CANE PRODUCTS, LTD., THE INSULITE COMPANY, JOHNS-MANVILLE SALES CORPORATION, NATIONAL GYPSUM COMPANY, AND WOOD CONVERSION COMPANY

Dated October 29, 1936

SUPPLEMENTAL AGREEMENT TO DEL CREDERE FACTOR'S AGREEMENT BETWEEN MASONITE CORPORATION AND ARMSTRONG-NEWPORT COMPANY

Dated October 29, 1936

ARMSTRONG-NEWPORT COMPANY,
Lancaster, Pennsylvania.

GENTLEMEN. Referring to the new del credere Factor's Agreement between Masonite Corporation as the Manufacturer and Armstrong-Newport Company as the del credere Factor, of even date herewith, and to our conversations concerning certain points which you felt should be subject to further clarification, we beg to advise you as follows:

1. Referring to the phrase "only fibre board manufactured primarily for the purpose of insulation and regularly sold by the Factor primarily for such purpose," contained in the last sentence of the second paragraph of Section 3 of the above mentioned del credere Factor's Agreement and to similar language contained in the last paragraph of Section 14 of said Agreement, Masonite Corporation will construe this as not prohibiting your right to combine in cars with Masonite's hardboard products Armstrong-Newport Company's fibre board insulation products sold as such and used primarily for insulation purposes, with or without special finish, and in various sizes, shapes, and thicknesses, and being presently known as your company's "Temlock" insulation

products, provided that your said products to be so combined in cars with hardboard products or for the purpose of a quantity price, bid, or quotation, and/or the processes of manufacture thereof do not infringe any of Masonite's patents listed on "Schedule I" annexed to said del credere Agreement.

2. You have advised us that Armstrong Cork Products Company is a wholly owned subsidiary of Armstrong Cork Company, and that Armstrong Cork Products Company acts as the selling company for Armstrong Cork Company products, as well as exclusive selling agent for Armstrong-Newport Company products, and that Armstrong Cork Products Company will act in like capacity in making sales of Masonite's hardboard products under your appointment as del credere Factor by the above mentioned del credere Factor's Agreement. Masonite will not object to your utilization of Armstrong Cork Products Company as your selling agency and will recognize orders received from it as being equivalent to orders received direct from Armstrong-Newport Company so long as Armstrong Cork Products Company remains the exclusive selling company for Armstrong-Newport products, and provided that Armstrong-Newport Company at all times shall remain fully obligated and responsible for the performance of all the terms and provisions of said del credere Factor's Agreement and guarantees to Masonite that Armstrong Cork Products Company will strictly comply with and observe all the terms and conditions to be observed by the Factor under said del credere Agreement.

3. Referring to the provisions of Section 24 of said del credere Factor's Agreement pursuant to which Masonite reserves the right to determine who shall be classified as a wholesaler, jobber, selling agents, or reserve and of acceptance, approval, or disapproval of appointments proposed to be made by the Factor. Masonite agrees that appointments proposed to it by Armstrong-Newport Company will be acted upon with customary business diligence and without undue delay.

4. With respect to the provisions of said del credere Agreement relating to the termination of the "Agency Agreement and License Option" and agreements supplemental thereto, referred to in Section 20 of the new del credere Agreement of even date herewith and to various provisions with respect to the graduated additional commission to be paid to the Factor as provided in Section 7 of said Agreement, Masonite desires to adjust the accounting of such graduated commission to conform to its fiscal year. Accordingly, it is agreed that said del credere Agreement shall be and the same is hereby modified in the following respects, to-wit:

(1) In clause (b) in the first paragraph of Section 7 the phrase

"calendar year" shall be stricken out and the phrase "contract year" inserted in lieu thereof;

(2) In paragraph numbered (5) of Section 7 the phrase "calendar year" appearing in the sentence immediately preceding the schedule of footage brackets and percentages shall be stricken out and the phrase "contract year" inserted in lieu thereof;

(3) In paragraph numbered (5) of Section 7 the phrase "calendar year" appearing in two places in the sentence immediately following the schedule of footage brackets and percentages shall be stricken out and the phrase "contract year" inserted in lieu thereof in both places;

(4) In subparagraph numbered 3rd, being the subparagraph immediately preceding the last paragraph of Section 7, the phrase reading, "shall constitute the graduated commission to be paid by the Manufacturer to the Factor" shall be changed so as to read, "shall constitute the graduated commission for such contract year to be paid by the Manufacturer to the Factor, except that for the first contract year the computation shall be as provided in Section 20 hereof."

(5) In the second sentence of the last paragraph of Section 16, the phrase "calendar year" appearing in two places in said sentence shall be stricken out and the phrase "contract year" inserted in lieu thereof in both places;

(6) Subparagraph (2) of Section 20 shall be modified to read as follows:

(2) That any hardboard products heretofore shipped by the Manufacturer to the Factor or to any existing selling agent of the Factor and unsold on the effective date of this Agreement shall be accounted for as if shipped under this Agreement, provided that, if advances have been made by the Factor pursuant to paragraph "8" of said prior agreement, then such advances shall stand as a credit in favor of the Factor in making settlement due under paragraph (2) of Section 7 of this Agreement;

(7) Subparagraphs (3) and (4) of said Section 20 shall be stricken out in their entirety and subparagraphs (3), (4), and (5) inserted in lieu thereof, reading as follows:

(3) That as to hardboard products sold by the Factor prior to the effective date of this Agreement but not on such effective date reported and fully accounted for, all advances or payments due to the Manufacturer and such commissions as may be due the Factor under the "First Bracket" of paragraph "9" of said prior agreement shall be settled and accounted for pursuant to the provisions of said prior agreement;

(4) That for the purpose of determining the applicable footage bracket, and the applicable percentage rates under paragraph "(5)" of Section 7 of this Agreement, the first contract year under

this Agreement shall be deemed to be the twelve months' period beginning on September 1, 1936, and ending on August 31, 1937, and the graduated additional commission for such first contract year under this Agreement shall be determined as follows:

1st. The total number of square feet, surface measurement, of all hardboard products sold by the Factor under the above mentioned prior agreement and under this Agreement for the twelve months' period beginning September 1, 1936, and ending August 31, 1937, shall be computed and the applicable footage bracket under paragraph "(5)" of Section 7 of this Agreement thereby determined;

2nd. The commissions which would be payable on account of the respective hardboard products so sold at the respective percentage rates set forth in paragraph "(5)" of Section 7 of this Agreement, computed on the respective car lot list prices to dealers and/or on the special separate fabricators' price list as to Special Concrete Form Board (excluding all-wrapping, tempering, processing and other special charges which carry a flat commission only) in effect at the respective dates of sale of said products shall then be determined;

3rd. The difference between the amount so determined under the foregoing clause "2nd" and the amount retained by the Factor pursuant to the "First Bracket" of paragraph "9" of said prior agreement as to current commissions on sales made from September 1, 1936, to the effective date of this Agreement plus the amount retained by the Factor under paragraph "(1)" of Section 7 of this Agreement as current commissions on sales made on and subsequent to the effective date of this Agreement and down to and including August 31, 1937, shall constitute the graduated commission for such first contract year.

(5) That as to sales of hard board products made prior to September 1, 1936, under the aforesaid prior agreement and during the contract year which was running and became terminated and cancelled upon the effective date of this Agreement, the Manufacturer will, as soon as practicable, and not more than sixty (60) days after the effective date of this Agreement, (a) compute the total number of square feet of the respective hard board products sold by the Factor from the beginning of such contract year under said prior agreement down to and including August 31, 1936, (b) compute the total number of square feet of the respective hard board products sold by the Factor from the beginning of such contract year down to the effective date of this Agreement and determine the bracket which would have been applicable under said prior agreement if sales had been continued at the same square foot volume for the respective hard board products for an entire twelve months' period, and (c) apply to the total number of square

feet computed under "(a)" above the percentages of the aggregate footage bracket of the prior agreement applicable to the computation under "(b)" above, and make settlement with the Factor for the amount so found to be due after taking into account the current commissions retained by the Factor on account of such sales as provided in paragraph "9" of said prior agreement.

If the above is in accordance with your understanding of the matters referred to, will you please indicate your approval by signing a duplicate of this letter and returning one of such signed duplicates to us, whereupon the same will constitute an understanding and agreement between us as to the said matters.

Dated at Chicago, Illinois, this 29th day of October, 1936.

Respectfully submitted.

MASONITE CORPORATION,

(Signed) By R. G. WALLACE,

Vice President.

The foregoing are approved and accepted as above set forth this 29th day of October 1936.

ARMSTRONG-NEWPORT COMPANY,

(Signed) By H. R. PECK,

Vice President.

SUPPLEMENTAL AGREEMENTS TO DEL CREDERE FACTOR'S AGREEMENT BETWEEN MASONITE CORPORATION AND THE CELOTEX CORPORATION

Dated, October 29, 1936

I

Supplemental Agreement

This Supplemental Agreement made this 29th day of October 1936, by and between Masonite Corporation, a Delaware corporation having its principal sales office at Chicago, Illinois, party of the first part, and The Celotex Corporation, a Delaware corporation having its principal executive offices at Chicago, Illinois, party of the second part, witnesseth that

Whereas, Hobart P. Young, as Co-receiver for and on behalf of The Celotex Company, a Delaware corporation, executed a del credere agency agreement with Masonite Corporation, a Delaware corporation, dated the 10th day of October 1933, together with a supplemental agreement thereto, also bearing said date, which are the agreements referred to in Section 20 of the del credere Factor's Agreement between the parties hereto of even date herewith and hereinafter referred to; and

Whereas, said receivership has been terminated and all of the assets and business of said The Celotex Company and the Receivers

thereof have been passed to, acquired by and become vested in The Celotex Corporation, a Delaware corporation, pursuant to certain proceedings had and taken in the United States District Court for the District of Delaware entitled "In the Matter of The Celotex Company, Debtor, No. 1080, In Proceedings for a Reorganization"; and

Whereas, Masonite Corporation as Plaintiff and The Celotex Company (the predecessor of The Celotex Corporation) and Hobart P. Young and Colin C. Bell as Receivers of said The Celotex Company as defendants were heretofore involved in a patent infringement suit involving United States Letters Patent No. 1,663,505, which patent, on appeal, was held valid and infringed as to certain claims, and pursuant to which and the waiver by Masonite Corporation of an accounting for profits and damages a final decree was entered in the United States District Court for the District of Delaware dated December 8, 1933; and

Whereas, The Celotex Corporation, as the successor in interest to the assets and business of said The Celotex Company and the Receivers thereof, and Masonite Corporation have agreed to make and execute that certain del credere Factor's Agreement of even date herewith, to which agreement this agreement is to be supplementary, and which agreement when so executed will supersede and cancel the aforesaid del credere agency agreement dated the 10th day of October 1933, and all agreements supplementary thereto;

Now, therefore, in consideration of the premises aforesaid it is hereby mutually agreed as follows:

1. In the event the Supreme Court, or any court of inferior jurisdiction from which no appeal is taken, should hold in any subsequent proceedings that Patent No. 1,663,505 is invalid or should substantially limit the scope of the claims thereof, Masonite Corporation agrees that The Celotex Corporation shall be accorded the benefit of such decision and relieved from the estoppel of the said del credere Factor's Agreement of even date herewith and of the decree in the aforesaid litigation against The Celotex Company and said receivers to the extent indicated by such later decision. It is understood that the foregoing provisions relating to relief from estoppel shall not be operative so long as Masonite Corporation shall in good faith continue to litigate the question of validity and/or infringement of said patent. It is further understood and agreed that the estoppel of the aforesaid decree of the United States District Court in the aforesaid litigation shall continue in force and effect against The Celotex Corporation and the provisions as to relief from estoppel herein contained shall also continue in force and effect throughout the term of said patent No. 1,663,505.

2. Masonite Corporation agrees that the provision of the said final decree in said patent infringement suit with respect to its waiver of an accounting and waiver of all claims for profits and damages by reason of the past infringement shall be deemed and construed to continue in force and effect for the benefit of The Celotex Corporation as the successor in interest to the parties defendant in said patent litigation.

In witness whereof, Masonite Corporation has caused this Agreement to be signed in its corporate name by its President or a Vice President thereunto duly authorized and its corporate seal to be hereto affixed, attested by its Secretary or an Assistant Secretary, and The Celotex Corporation has caused this Agreement to be signed in its corporate name by its President or a Vice President thereunto duly authorized and its corporate seal to be hereto affixed, attested by its Secretary or an Assistant Secretary, all in duplicate and all as of the date and year first above written.

MASONITE CORPORATION,

[SEAL] (Signed) By R. G. WALLACE,
Vice-President.

Attest:

(Signed) E. L. SABERSON,
Assistant Secretary.

THE CELOTEX CORPORATION,

[SEAL] (Signed) By B. G. DAHLBERG,
President.

Attest:
CHAS. G. RHODES, *Secretary.*

II

Attention Mr. R. G. Wallis, Vice President

MASONITE CORPORATION,
111 West Washington Street, Chicago, Illinois.

GENTLEMEN. Referring to the proposed del credere Factor's agreement of even date herewith, we understand that in the preparation of this agreement it has been necessary for you to keep in mind the fact that it is proposed that like agreements will be entered into between you and certain other del credere factors. This being the case there are certain facts peculiar to our situation which may be more appropriately covered by a supplementary letter rather than incorporating them in a contract the form of which is to be used for other factors as well as ourselves. Accordingly, and in line with our conversation, we suggest that the following points be covered by letter agreement:

1. Referring to the second paragraph in Section 3 and to the last paragraph in Section 14 of the aforesaid del credere agreement and to the last paragraph in Section 6 of the license agree-

ment attached thereto as "Schedule III," providing that products which may be combined in cars with hard board products or combined for the purpose of a quantity price, bid or quotation shall be limited to "fibre board manufactured primarily for the purposes of insulation and regularly sold by the Factor primarily for such purposes," it is our understanding that this is not intended to exclude our present product known as C-X Utility Board as being presently manufactured by us, nor any other substantially similar fibre board product, provided that none of our products to be so combined in cars with hard board products or for the purpose of a quantity price, bid or quotation shall infringe any of the patents listed on "Schedule I" of said del credere agreement.

2. Referring to Section 20 of said del credere agreement, wherein it is stated that the parties thereto had theretofore entered into a certain agency agreement and license option, it is understood that the former agency agreement under which we have been operating was an agreement entered into by Hobart P. Young, Receiver for The Celotex Company, the predecessor in interest of The Celotex Corporation, and that it is that agreement together with any agreements suplementary thereto which will be canceled by the execution and delivery of the del credere Factor's agreement of even date herewith.

3. Referring to Section 24, paragraph (o) of said del credere Factor's agreement, we understand that you agree to continue to recognize Rocky Mountain Celotex Company, with principal offices located at Denver, Colorado, and Asbestos Supply Company, with principal offices located at Seattle, Washington, as our selling agents and that such recognition shall continue in effect so long as they remain our duly appointed selling agents and observe and adhere to the provisions of the aforesaid del credere agreement.

4. We understand that no del credere agreement of substantially like tenor will become effective with others than ourselves prior to the date to be inserted (as covered in escrow agreement with Harris Trust & Savings Bank) in proposed del credere agreement referred to herein.

If the above is in accordance with your understanding of the matters above referred to as they apply to The Celotex Corporation, will you please indicate your approval by signing the duplicate of this letter and returning one of such signed duplicates to us. Signed at Chicago this 29th day of October 1936.

Yours truly,

THE CELOTEX CORPORATION,

(Signed) By B. G. DAHLBERG, *President.*

The matters above mentioned are in accordance with our

understanding and are approved by us as above stated this 29th day of October 1936.

MASONITE CORPORATION,
(Signed) By R. G. WALLACE,
Vice President.

III

MASONITE CORPORATION
CONWAY BUILDING

Chicago, Ill., October 29, 1936.

THE CELOTEX CORPORATION,
919 North Michigan Avenue, Chicago, Illinois.

GENTLEMEN: This will advise you that, commencing on the date hereof and pending further notice, Masonite Corporation is prepared to furnish, on orders from its del credere factors, its Quartrboard in the following sizes, to wit: 4′ x 7′, 4′ x 8′, 4′ x 9′, and 4′ x 10′. Orders will be accepted, pending further notice, for the above sizes at Masonite's dealer's prices for "longs" appearing on its current dealer's price list, on which Factor's regular commission as provided in the del credere Factor's Agreement, will be allowed, and without obligation on Factor's part to take the resultant "shorts" provided that not less than twenty percent (20%) in quantity of Factor's orders for Quartrboard during each ninety day period are for 4′ x 12′ and/or 4′ x 6′ sizes.

It is further understood that on orders for standard sized 4′ x 12′ Quartrboard (or 4′ x 6′ when so ordered) the price will continue to be the current dealer's list price, on which Factor's regular commission as provided in the del credere Factor's Agreement will be allowed.

As provided in the del credere Factor's Agreement, all orders must be for not less than car lot quantities.

The foregoing applies only to Masonite's Quartrboard and does not include DeLuxe Quartrboard, and Masonite Corporation reserves the right to modify or withdraw this offer at any time on thirty days' notice.

Yours very truly,

MASONITE CORPORATION,
(Signed) By R. G. WALLACE,
Vice President.

RGW:L.

IV

THE CELOTEX CORPORATION,
919 North Michigan Avenue, Chicago, Illinois.

GENTLEMEN: Referring to the new del credere Factor's Agreement between Masonite Corporation as the Manufacturer and The Celotex Corporation as the del credere Factor, of even date here-

with, and particularly to the provisions thereof relating to the termination of the "Agency Agreement and License Option" referred to in Section 20 of the new del credere agreement and to various provisions with respect to the graduated additional commission to be paid to the Factor as provided in Section 7 of said agreement, Masonite desires to adjust the accounting on such graduated commission to conform to its fiscal year. Accordingly, it is agreed that said del credere agreement shall be, and same is hereby, modified in the following respects, to wit:

(1) In clause (b) in the first paragraph of Section 7 the phrase "calendar year" shall be stricken out and the phrase "contract year" inserted in lieu thereof;

(2) In paragraph numbered (5) of Section 7 the phrase "calendar year" appearing in the sentence immediately preceding the schedule of footage brackets and percentages shall be stricken out and the phrase "contract year" inserted in lieu thereof;

(3) In paragraph numbered (5) of Section 7 the phrase "calendar year" appearing in two places in the sentence immediately following the schedule of footage brackets and the percentages shall be stricken out and the phrase "contract year" inserted in lieu thereof in both places;

(4) In subparagraph numbered 3rd, being the subparagraph immediately preceding the last paragraph of Section 7, the phrase reading. "shall constitute the graduated commission to be paid by the Manufacturer to the Factor" shall be changed so as to read, "shall constitute the graduated commission for such contract year to be paid by the Manufacturer to the Factor, except that for the first contract year the computation shall be as provided in Section 20 hereof."

(5) In the second sentence of the last paragraph of Section 16, the phrase "calendar year" appearing in two places in said sentence shall be stricken out and the phrase "contract year" inserted in lieu thereof in both places;

(6) Subparagraph (2) of Section 20 shall be modified to read as follows:

(2) That any hard board products heretofore shipped by the Manufacturer to the Factor or to any existing selling agent of the Factor and unsold on the effective date of this Agreement shall be accounted for as if shipped under this Agreement, provided that, if advances have been made by the Factor pursuant to paragraph "8" of said prior agreement, then such advances shall stand as a credit in favor of the Factor in making settlement due under paragraph (2) of Section 7 of this Agreement;

(7) Subparagraphs (3) and (4) of said Section 20 shall be stricken out in their entirety and subparagraphs (3), (4), and (5) inserted in lieu thereof, reading as follows:

(3) That as to hard board products sold by the Factor prior to the effective date of this Agreement but not on such effective date reported and fully accounted for, all advances or payments due to the Manufacturer and such commissions as may be due the Factor under the "First Bracket" of paragraph "9" of said prior agreement shall be settled and accounted for pursuant to the provisions of said prior agreement;

(4) That for the purpose of determining the applicable footage bracket, and the applicable percentage rates under paragraph "(5)" of Section 7 of this Agreement, the first contract year under this Agreement shall be deemed to be the twelve months' period beginning on September 1, 1936, and ending on August 31, 1937, and the graduated additional commission for such first contract year under this Agreement shall be determined as follows:

1st. The total number of square feet, surface measurement, of all hard board products sold by the Factor under the above mentioned prior agreement and under this Agreement for the twelve months' period beginning September 1, 1936, and ending August 31, 1937, shall be computed and the applicable footage bracket under paragraph "(5)" of Section 7 of this Agreement thereby determined;

2nd. The commissions which would be payable on account of the respective hard board products so sold at the respective percentage rates set forth in paragraph "(5)" of Section 7 of this Agreement, computed on the respective car lot list prices to dealers and/or on the special separate fabricators' price list as to Special Concrete Form Board (excluding all wrapping, tempering, processing, and other special charges which carry a flat commission only) in effect at the respective dates of sale of said products shall then be determined;

3rd. The difference between the amount so determined under the foregoing clause "2nd" and the amount retained by the Factor pursuant to the "First Bracket" of paragraph "9" of said prior agreement as to current commissions on sales made from September 1, 1936, to the effective date of this Agreement plus the amount retained by the Factor under paragraph "(1)" of Section 7 of this Agreement as current commissions on sales made on and subsequent to the effective date of this Agreement and down to and including August 31, 1937, shall constitute the graduated commission for such first contract year.

(5) That as to sales of hard board products made prior to September 1, 1936, under the aforesaid prior agreement and during the contract year which was running and became terminated and cancelled upon the effective date of this Agreement, the Manufacturer will, as soon as practicable, and not more than sixty (60) days after the effective date of this Agreement, (a) compute the total number of square feet of the respective hard board products

sold by the Factor from the beginning of such contract year under said prior agreement down to and including August 31, 1936, (b) compute the total number of square feet of the respective hard board products sold by the Factor from the beginning of such contract year down to the effective date of this Agreement and determine the bracket which would have been applicable under said prior agreement if sales had been continued at the same square foot volume for the respective hard board products for an entire twelve months' period, and (c) apply to the total number of square feet computed under "(a)" above the percentages of the aggregate footage bracket of the prior agreement applicable to the computation under "(b)" above, and make settlement with the Factor for the amount so found to be due after taking into account the current commissions retained by the Factor on account of such sales as provided in paragraph "9" of said prior agreement.

If the above is in accordance with your understanding of the matters referred to, will you please indicate your approval by signing a duplicate of this letter and returning one of such signed duplicates to us, whereupon the same will constitute an understanding and agreement between us as to said matters.

Dated at Chicago, Illinois, this 29th day of October 1936.

Respectfully submitted.

MASONITE CORPORATION

(Signed) By R. G. WALLACE,
Vice President.

The foregoing are approved and accepted as above set forth this 29th day of October 1936.

THE CELOTEX CORPORATION,

(Signed) By T. B. MONROE,
Vice President.

SUPPLEMENTAL AGREEMENT TO DEL CREDERE FACTOR'S AGREEMENT BETWEEN MASONITE CORPORATION AND HAWAIIAN CANE PRODUCTS, LTD.

Dated October 29, 1936

HAWAIIAN CANE PRODUCTS, LTD.,
Honolulu, Territory of Hawaii.

GENTLEMEN. Referring to the new del credere Factor's Agreement between Masonite Corporation as the Manufacturer and Hawaiian Cane Products, Ltd. as the del credere Factor, of even date herewith, and particularly to the provisions thereof relating to the termination of the "Agency Agreement and License Option" referred to in Section 20 of the new del credere agreement and to various provisions with respect to the graduated additional commission to be paid to the Factor as provided in

Section 7 of said agreement, Masonite desires to adjust the accounting on such graduated commission to conform to its fiscal year. Accordingly, it is agreed that said del credere agreement shall be, and the same is hereby, modified in the following respects, to-wit:

(1) In clause (b) in the first paragraph of Section 7 the phrase "calendar year" shall be stricken out and the phrase "contract year" inserted in lieu thereof;

(2) In paragraph numbered (5) of Section 7 the phrase "calendar year" appearing in the sentence immediately preceding the schedule of footage brackets and percentages shall be stricken out and the phrase "contract year" inserted in lieu thereof;

(3) In paragraph numbered (5) of Section 7 the phrase "calendar year" appearing in two places in the sentence immediately following the schedule of footage brackets and the percentages shall be stricken out and the phrase "contract year" inserted in lieu thereof in both places;

(4) In subparagraph numbered 3rd, being the subparagraph immediately preceding the last paragraph of Section 7, the phrase reading, "shall constitute the graduated commission to be paid by the Manufacturer to the Factor" shall be changed so as to read, "shall constitute the graduated commission for such contract year to be paid by the Manufacturer to the Factor, except that for the first contract year the computation shall be as provided in Section 20 hereof."

(5) In the second sentence of the last paragraph of Section 16, the phrase "calendar year" appearing in two places in said sentence shall be stricken out and the phrase "contract year" inserted in lieu thereof in both places;

(6) Subparagraph (2) of Section 20 shall be modified to read as follows:

(2) That any hardboard products heretofore shipped by the Manufacturer to the Factor or to any existing selling agent of the Factor and unsold on the effective date of this Agreement shall be accounted for as if shipped under this Agreement, provided that, if advances have been made by the Factor pursuant to paragraph "8" of said prior agreement, then such advances shall stand as a credit in favor of the Factor in making settlement due under paragraph (2) of Section 7 of this Agreement;

(7) Subparagraphs (3) and (4) of said Section 20 shall be stricken out in their entirety and subparagraphs (3), (4), and (5) inserted in lieu thereof, reading as follows:

(3) That as to hardboard products sold by the Factor prior to the effective date of this Agreement but not on such effective date reported and fully accounted for, all advances or payments due to the Manufacturer and such commissions as may be due the

Factor under the "First Bracket" of paragraph "9" of said prior agreement shall be settled and accounted for pursuant to the provisions of said prior agreement;

(4) That for the purpose of determining the applicable footage bracket, and the applicable percentage rates under paragraph "(5)" of Section 7 of this Agreement, the first contract year under this Agreement shall be deemed to be the twelve months' period beginning on September 1, 1936, and ending on August 31, 1937, and the graduated additional commission for such first contract year under this Agreement shall be determined as follows:

1st. The total number of square feet, surface measurement, of all hardboard products sold by the Factor under the above mentioned prior agreement and under this Agreement for the twelve months' period beginning September 1, 1936, and ending August 31, 1937, shall be computed and the applicable footage bracket under paragraph "(5)" of Section 7 of this Agreement thereby determined;

2nd. The commissions which would be payable on account of the respective hardboard products so sold at the respective percentage rates set forth in paragraph "(5)" of Section 7 of this Agreement, computed on the respective car lot list prices to dealers and/or on the special separate fabricators' price list as to Special Concrete Form Board (excluding all wrapping, tempering, processing and other special charges which carry a flat commission only) in effect at the respective dates of sale of said products shall then be determined;

3rd. The difference between the amount so determined under the foregoing clause "2nd" and the amount retained by the Factor pursuant to the "First Bracket" of paragraph "9" of said prior agreement as to current commissions on sales made from September 1, 1936, to the effective date of this Agreement plus the amount retained by the Factor under paragraph "(1)" of Section 7 of this Agreement as current commissions on sales made on and subsequent to the effective date of this Agreement and down to and including August 31, 1937, shall constitute the graduated commission for such first contract year.

(5) That as to sales of hardboard products made prior to September 1, 1936, under the aforesaid prior agreement and during the contract year which was running and became terminated and cancelled upon the effective date of this Agreement, the Manufacturer will, as soon as practicable, and not more than sixty (60) days after the effective date of this Agreement, (a) compute the total number of square feet of the respective hardboard products sold by the Factor from the beginning of such contract year under said prior agreement down to and including

August 31, 1936, (b) compute the total number of square feet of the respective hardboard products sold by the Factor from the beginning of such contract year down to the effective date of this Agreement and determine the bracket which would have been applicable under said prior agreement if sales had been continued at the same square foot volume for the respective hardboard products for an entire twelve months' period, and (c) apply to the total number of square feet computed under "(a)" above the percentages of the aggregate footage bracket of the prior agreement applicable to the computation under "(b)" above, and make settlement with the Factor for the amount so found to be due after taking into account the current commissions retained by the Factor on account of such sales as provided in paragraph "9" of said prior agreement.

If the above is in accordance with your understanding of the matters referred to, will you please indicate your approval by signing a duplicate of this letter and returning one of such signed duplicates to us, whereupon the same will constitute an understanding and agreement between us as to said matters.

Dated at Chicago, Illinois, this 29th day of October 1936.

Respectfully submitted.

MASONITE CORPORATION,
(Signed) By R. G. WALLACE,
Vice President.

The foregoing are approved and accepted as above set forth this 29th day of October 1936.

HAWAIIAN CANE PRODUCTS, LTD.,
(Signed) By W. G. STROMQUIST,
Vice President

SUPPLEMENTAL AGREEMENTS TO DEL CREDERE FACTOR'S AGREEMENT BETWEEN MASONITE CORPORATION AND THE INSULITE COMPANY

Dated October 29, 1936

I

MASONITE CORPORATION,
111 W. Washington Street, Chicago, Illinois.

GENTLEMEN. Referring to the new Del Credere Factor's Agreement of even date herewith, we understand that said Agreement has been prepared in form to be entered into not only between your Company and ourselves but also with certain other Del Credere Factors. This being the case there are certain matters peculiar to our situation which may be more appropriately covered by a supplemental letter. Accordingly, in consideration of

the execution by The Insulite Company of said Del Credere Factor's Agreement, it is further understood and agreed as follows:

1. The acknowledgment of validity and the agreement by The Insulite Company that it will not, during the term of said Del Credere Agreement, directly or indirectly contest the validity or title of Masonite's United States Letters Patent listed on Schedule I annexed to said Del Credere Agreement, shall not be deemed to include an acknowledgment by The Insulite Company of the validity of Masonite's United States Patent No. 1941536. However, The Insulite Company agrees that during the term of said Del Credere Agreement Masonite Corporation may continue to enjoy the use of said Patent free from any claim by The Insulite Company of infringement or liability on account of the use thereof, it being understood and agreed that any waiver of rights of either party by virtue hereof shall be without prejudice to either party to assert such rights as they may respectively claim following the termination of said Del Credere Agreement.

2. Further referring to the provisions of Section 1 of said Del Credere Agreement that this Company, during the term of said Agreement, will not, directly or indirectly, contest the validity or title of said Letters Patent, or any of them, in so far as the application of the inventions thereof is to Hardboard products or the manufacture thereof, it is understood that said language is limited in its application to Masonite's United States Patents and that the use of the phrase "directly or indirectly" in said Section 1 shall not be deemed to extend the covenant therein contained to any of Masonite's foreign Patents.

3. The Insulite Company is now manufacturing structural rigid boards composed basically of wood pulp fibre which are manufactured under the generally recognized manufacturing methods and processes applying to insulation board products, without the use of presses, the products of this type being now known as "Bildrite Sheathing." Referring to the second paragraph in Section 3 and to the last paragraph in Section 14 of said Del Credere Factor's Agreement providing that products which may be combined in cars with Hardboard products or combined for the purpose of a quantity price, bid, or quotation, shall be limited to "fibreboard manufactured primarily for the purpose of insulation and regularly sold by the Factor primarily for such purpose," it is agreed that The Insulite Company's products of the type and character above described and manufactured under the processes above described, regardless of the density thereof, may be combined for the aforesaid purposes, it being understood that these products are not, and will not be, manufactured under any of the processes covered by any of Masonite Corporation's Patents

listed in Schedule I annexed to said Del Credere Factor's Agreement. It is further agreed that in event that any claim shall be asserted by Masonite Corporation that the manufacture and/or sale of The Insulite Company's products of the type and character above described infringe any of Masonite Corporation's Patents listed in said Schedule I, the assertion of such claim or any dispute arising between the parties in respect thereof shall not constitute a basis for the cancellation of said Del Credere Factor's Agreement.

If the above is in accordance with your understanding of the matters referred to, will you please indicate your approval by signing a duplicate of this letter and returning one of such signed duplicates to us, whereupon the same will constitute an agreement between us as to said matters supplemental to said Del Credere Agreement.

Dated at Minneapolis, Minnesota, this 29th day of October 1936.

Respectfully submitted.

THE INSULITE COMPANY,
(Signed) By R. H. M. ROBINSON,
President.

The foregoing are approved and accepted as above set forth this 29th day of October 1936.

MASONITE CORPORATION,
(Signed) By BEN ALEXANDER,
President.

II

THE INSULITE COMPANY,
1100 Builders Exchange, Minneapolis, Minnesota.

GENTLEMEN. Referring to the new Del Credere Factor's Agreement between Masonite Corporation as a Manufacturer and The Insulite Company as the Del Credere Factor, of even date herewith, and to our conversations concerning certain points which you feel should be subject to certain clarification, and in consideration of the execution of said Del Credere Factor's Agreement, it is further understood and agreed between us as follows:

1. Referring to the various classes of trade to which the Factor is entitled to sell Masonite's Hardboard Products as specified in Section 9 of said Del Credere Agreement and as defined in Section 24 of said Agreement, the Manufacturer agrees that it will impose and observe as to its own dealers, wholesalers, and jobbers, reserves and as to any selling agents which it may appoint, like

standards of requirements for each such classification, respectively, as it is at the time imposing on the Factor.

2. Referring to Section 24, paragraph (o), of said Del Credere Factor's Agreement, Masonite Corporation agrees to continue to recognize Huttig Sash and Door Company, a Delaware corporation having its principal place of business at St. Louis, Missouri (including the following subsidiary companies of Huttig Sash and Door Company, namely Memphis Sash and Door Company of Memphis, Tennessee, Birmingham Sash and Door Company of Birmingham, Alabama, and Huttig Sash and Door Company of Texas, Dallas, Texas), The Paraffine Companies, Inc., a Delaware corporation, having its principal place of business at San Francisco, California, and The Flintkote Company, a Massachusetts corporation having its principal place of business in New York City, as Selling Agents of The Insulite Company, and that such recognition shall continue in effect as to each such company so long as it remains the duly appointed Selling Agent of The Insulite Company and so long as it observes and adheres to all of the terms and provisions of the aforesaid Del Credere Agreement. Masonite Corporation further agrees that so long as each such Selling Agent is so recognized and continues to be so recognized as aforesaid, it will not sell any of its products covered by said Del Credere Agreement direct to such Selling Agent.

3. Referring to the provisions of Section 24 of said Del Credere Factor's Agreement, pursuant to which Masonite Corporation reserves the right to determine who shall be classified as a wholesaler, jobber, selling agent or reserve and of acceptance, approval or disapproval of appointments proposed to be made by the Factor, Masonite Corporation agrees that appointments proposed to it by The Insulite Company will be acted upon with customary business diligence and without undue delay.

4. The Del Credere Agreement and Schedule II annexed thereto provide that Black Tempered Presdwood and Special Concrete Form Board are special products of the Manufacturer which may either be discontinued or which may from time to time not be available. If, at any time, while said Del Credere Agreement is in force and effect the Manufacturer shall determine to discontinue the manufacturing and/or sale of either of these products to the classes of trade to which the Factor is permitted to sell under said Agreement, it will give the Factor thirty (30) days written notice of such discontinuance and if at any time or from time to time while this Agreement remains in force and effect either of such products shall not be available for sale to the classes of trade to which the Factor is permitted to sell, it will give to the Factor ten (10) days written notice of the fact that either

or both of said products are not so available, as the case may be.

5. In Section 16 of said Del Credere Factor's Agreement with respect to the rights and obligations of the parties to said agreement in the event of cancellation, it is provided, among other things, as follows:

"However, at the option of the Manufacturer, it will return to the Manufacturer all or such portion of undamaged standard sized hardboards and 'longs' as the Manufacturer shall request, and shall account for and pay over to the Manufacturer, in respect of such other hardboard products as the Factor or its selling agents may have on hand, as though such hardboard products were sold. As to all hardboard products so returned, the Manufacturer shall refund to the Factor any advances which may have been made by the Factor to the Manufacturer on account thereof."

The Manufacturer agrees that in event it shall exercise the option as set forth in the above quoted language to require the Factor to return undamaged longs, there shall also be returned therewith an amount of shorts (which may be diversified between 2′ x 4′, 3′ x 4′ and 4′ x 4′ sizes) corresponding to the footage which was cut from the longs so returned.

If the above is in accordance with your understanding of the matters referred to, will you please indicate your approval by signing a duplicate of this letter and returning one of such signed duplicates to us, whereupon the same will constitute an understanding and agreement between us as to the said matters.

Dated at Chicago, Illinois, this 29th day of October 1936.

Respectfully submitted.

MASONITE CORPORATION,
(Signed) By BEN ALEXANDER,
President.

The foregoing are approved and accepted as above set forth this 29th day of October 1936.

THE INSULITE COMPANY,
(Signed) By R. H. M. ROBINSON,
President.

III

THE INSULITE COMPANY,

Builders Exchange Building, Minneapolis, Minnesota.

GENTLEMEN. Referring to the new del credere Factor's Agreement between Masonite Corporation as the Manufacturer and The Insulite Company as the del credere Factor, of even date herewith,

and particularly to the provisions thereof relating to the termination of the "Agency Agreement and License Option" referred to in Section 20 of the new del credere agreement and to various provisions with respect to the graduated additional commission to be paid to the Factor as provided in Section 7 of said agreement, Masonite desires to adjust the accounting on such graduated commission to conform to its fiscal year. Accordingly, it is agreed that said del credere agreement shall be, and the same is hereby, modified in the following respects, to-wit:

(1) In clause (b) in the first paragraph of Section 7 the phrase "calendar year" shall be stricken out and the phrase "contract year" inserted in lieu thereof;

(2) In paragraph numbered (5) of Section 7 the phrase "calendar year" appearing in the sentence immediately preceding the schedule of footage brackets and percentages shall be stricken out and the phrase "contract year" inserted in lieu thereof;

(3) In paragraph numbered (5) of Section 7 the phrase "calendar year" appearing in two places in the sentence immediately following the schedule of footage brackets and the percentages shall be stricken out and the phrase "contract year" inserted in lieu thereof in both places;

(4) In subparagraph numbered 3rd, being the sub-paragraph immediately preceding the last paragraph of Section 7, the phrase reading, "shall constitute the graduated commission to be paid by the Manufacturer to the Factor" shall be changed so as to read, "shall constitute the graduated commission for such contract year to be paid by the Manufacturer to the Factor, except that for the first contract year the computation shall be as provided in Section 20 hereof."

(5) In the second sentence of the last paragraph of Section 16, the phrase "calendar year" appearing in two places in said sentence shall be stricken out and the phrase "contract year" inserted in lieu thereof in both places;

(6) Subparagraph (2) of Section 20 shall be modified to read as follows:

(2) That any hardboard products heretofore shipped by the Manufacturer to the Factor or to any existing selling agent of the Factor and unsold on the effective date of this Agreement shall be accounted for as if shipped under this Agreement, provided that, if advances have been made by the Factor pursuant to paragraph "8" of said prior agreement, then such advances shall stand as a credit in favor of the Factor in making settlement due under paragraph (2) of Section 7 of this Agreement;

(7) Subparagraphs (3) and (4) of said Section 20 shall be stricken out in their entirety and subparagraphs (3), (4), and (5) inserted in lieu thereof, reading as follows:

(3) That as to hardboard products sold by the Factor prior to the effective date of this Agreement but not on such effective date reported and fully accounted for, all advances or payments due to the Manufacturer and such commissions as may be due to the Factor under the "First Bracket" of paragraph "9" of said prior agreement shall be settled and accounted for pursuant to the provisions of said prior agreement;

(4) That for the purpose of determining the applicable footage bracket, and the applicable percentage rates under paragraph "(5)" of Section 7 of this Agreement, the first contract year under this Agreement shall be deemed to be the twelve months' period beginning on September 1, 1936, and ending on August 31, 1937, and the graduated additional commission for such first contract year under this Agreement shall be determined as follows:

1st. The total number of square feet, surface measurement, of all hardboard products sold by the Factor under the above mentioned prior agreement and under this Agreement for the twelve months' period beginning September 1, 1936, and ending August 31, 1937, shall be computed and the applicable footage bracket under paragraph "(5)" of Section 7 of this Agreement thereby determined;

2nd. The commissions which would be payable on account of the respective hardboard products so sold at the respective percentage rates set forth in paragraph "(5)" of Section 7 of this Agreement, computed on the respective car lot list prices to dealers and/or on the special separate fabricators' price list as to Special Concrete Form Board (excluding all wrapping, tempering, processing, and other special charges which carry a flat commission only) in effect at the respective dates of sale of said products shall then be determined;

3rd. The difference between the amount so determined under the forgoing clause "2nd" and the amount retained by the Factor pursuant to the "First Bracket" of paragraph "9" of said prior agreement as to current commissions on sales made from September 1, 1936, to the effective date of this Agreement plus the amount retained by the Factor under paragraph "(1)" of Section 7 of this Agreement as current commissions on sales made on and subsequent to the effective date of this Agreement and down to and including August 31, 1937, shall constitute the graduated commission for such first contract year.

(5) That as to sales of hardboard products made prior to September 1, 1936, under the aforesaid prior agreement and during the contract year which was running and became terminated and cancelled upon the effective date of this Agreement, the Manufacturer will, as soon as practicable, and not more than sixty (60) days after the effective date of this Agreement, (a) compute the total number of square feet of the respective hardboard products

sold by the Factor from the beginning of such contract year under said prior agreement down to and including August 31, 1936, (b) compute the total number of square feet of the respective hardboard products sold by the Factor from the beginning of such contract year down to the effective date of this Agreement and determine the bracket which would have been applicable under said prior agreement if sales had been continued at the same square foot volume for the respective hardboard products for an entire twelve months' period, and (c) apply to the total number of square feet computed under "(a)" above the percentages of the aggregate footage bracket of the prior agreement applicable to the computation under "(b)" above, and make settlement with the Factor for the amount so found to be due after taking into account the current commissions retained by the Factor on account of such sales as provided in paragraph "9" of said prior agreement.

If the above is in accordance with your understanding of the matters referred to, will you please indicate your approval by signing a duplicate of this letter and returning one of such signed duplicates to us, whereupon the same will constitute an understanding and agreement between us as to said matters.

Dated at Chicago, Illinois, this 29th day of October 1936.

Respectfully submitted.

MASONITE CORPORATION,

(Signed) By BEN ALEXANDER, *President.*

The foregoing are approved and accepted as above set forth this 29th day of October 1936.

THE INSULITE COMPANY,

(Signed) By R. H. M. ROBINSON,

President,

IV

THE INSULITE COMPANY,

1100 Builders Exchange Building, Minneapolis, Minn.

GENTLEMEN. Referring to the new del credere Factors Agreement between Masonite Corporation and The Insulite Company, of even date herewith, and referring to that certain Export Agreement between Masonite Corporation and The Insulite Company, dated February 2, 1935, and a Supplemental Agreement thereto dated February 8, 1935, it appears that said Export Agreement was originally entered into in connection with the execution of the "Agency Agreement and License Option" between Masonite Corporation and The Insulite Company dated February 2, 1935, which last named agreement will be cancelled and superseded by the execution and delivery of the new del credere Factors Agreement of even date herewith.

Said Export Agreement dated February 2, 1935, contains a paragraph number 8 reading as follows:

"This agreement shall not be assignable without the consent of Masonite and shall be cancellable by either party on thirty days' notice on or after the expiration or cancellation of said Agency Agreement between the parties hereto dated February 2nd, 1935."

Accordingly, and in consideration of the execution of said new del credere Factors Agreement, it is hereby further understood and agreed between us that said Export Agreement be, and the same is modified and amended by striking out said paragraph number 8 as above quoted, and inserting in lieu thereof the following new paragraph number 8, to wit:

"This agreement shall not be assignable without the consent of Masonite and shall be cancellable by either party on thirty days' notice on or after the expiration or cancellation of the del credere Factors Agreement between Masonite Corporation and The Insulite Company, of even date herewith"

and that as so amended said Export Agreement dated February 2, 1935, and the supplement thereto dated February 8, 1935, shall continue in full force and effect according to the terms and provisions thereof.

If the above is in accordance with your understanding, will you please indicate your approval by signing a duplicate of this letter and return one of such signed duplicates to us, whereupon the same will constitute an agreement between us modifying said Export Agreement as above set forth.

Dated at Chicago, Illinois, this 29th day of October, 1936.

Respectfully submitted.

MASONITE CORPORATION,
(Signed) By R. G. WALLACE,
Vice President.

The foregoing approved and accepted as above set forth this 29th day of October 1936.

THE INSULITE COMPANY,
(Signed) By R. H. M. ROBINSON,
President.

SUPPLEMENTAL AGREEMENT TO DEL CREDERE FACTOR'S AGREEMENT BETWEEN MASONITE CORPORATION AND JOHNS-MANVILLE SALES CORPORATION

Dated October 29, 1936

JOHNS-MANVILLE SALES CORPORATION,
22 East 40th Street, New York, N. Y.

GENTLEMEN. Referring to the new del credere Factor's Agreement between Masonite Corporation as the Manufacturer and

Johns-Manville Sales Corporation as the del credere Factor of even date herewith, and to our conversations concerning certain points which you felt should be subject to clarification, and in consideration of the execution of said del credere Factor's Agreement, it is further understood and agreed between us as follows:

1. Referring to the first paragraph of Section 17 of said del credere Agreement, the Manufacturer agrees that said paragraph shall not be construed as granting a license to the Manufacturer under any patent or patent rights now or hereafter owned by the Factor or by any of its subsidiary or affiliated companies.

2. Referring to the last sentence of Section 24 of said del credere Agreement, the Manufacturer further agrees that it will not, directly or indirectly, use the authority reserved to it to modify the standard of requirements for dealer classification as set forth in subparagraph (m) of said Section 24, for the purpose or with the intent of diverting customers or business from the Factor to the Manufacturer or from one factor to another factor.

3. Referring to the various classes of trade to which the Factor is entitled to sell Masonite's hardboard products as specified in Section 9 of said del credere Factor's Agreement and as defined in Section 24 of said Agreement, the Manufacturer agrees that it will impose and observe, as to its own dealers, wholesalers and jobbers, reserves and as to any selling agents which it may appoint, like standards of requirements for each such classification, respectively, as it is at the time imposing on the Factor.

4. Referring to the provisions of Section 24 of said del credere Factor's Agreement, pursuant to which Masonite reserves the right to determine who shall be classified as a wholesaler, jobber, selling agent or reserve and of acceptance, approval or disapproval of appointments proposed to be made by the Factor, Masonite agrees that appointments proposed to it by Johns-Manville Sales Corporation will be acted upon at all times with reasonable business diligence and without undue delay.

5. By Section 4 of said del credere Agreement, it is provided, among other things, as follows:

"The Factor further agrees to procure and carry, at its own expense, adequate insurance against the usual hazards incident to the transportation and storage of all hardboard products shipped to it or its selling agents, and all insurance policies for such coverage shall be made payable to the Manufacturer and the Factor as their respective interests may appear."

It is hereby agreed that the foregoing provision shall not require your company, as del credere Factor, to take out new insurance or to make any changes in its policies of insurance now in effect, it being understood that your company carries general insurance of the socalled "Floater" type; and it also being understood that

your company agrees to indemnify Masonite Corporation for any losses caused by the usual hazards referred to in said Section 4 of said del credere Agreement.

6. With respect to the provisions of said del credere Agreement relating to the termination of the "Agency Agreement and License Option" and agreements supplemental thereto, referred to in Section 20 of the new del credere Agreement of even date herewith and to various provisions with respect to the graduated additional commission to be paid to the Factor as provided in Section 7 of said Agreement Masonite desires to adjust the accounting on such graduated commission to conform to its fiscal year. Accordingly, it is agreed that said del credere Agreement shall be and the same is hereby modified in the following respects, to-wit:

(1) In clause (b) in the first paragraph of Section 7 the phrase "calendar year" shall be stricken out and the phrase "contract year" inserted in lieu thereof;

(2) In paragraph numbered (5) of Section 7 the phrase "calendar year" appearing in the sentence immediately preceding the schedule of footage brackets and percentages shall be stricken out and the phrase "contract year" inserted in lieu thereof;

(3) In paragraph numbered (5) of Section 7 the phrase "calendar year" appearing in two places in the sentence immediately following the schedule of footage brackets and percentages shall be stricken out and the phrase "contract year" inserted in lieu thereof in both places;

(4) In subparagraph numbered 3rd, being the subparagraph immediately preceding the last paragraph of Section 7, the phrase reading, "shall constitute the graduated commission to be paid by the Manufacturer to the Factor" shall be changed so as to read, "shall constitute the graduated commission for such contract year to be paid by the Manufacturer to the Factor, except that for the first contract year the computation shall be as provided in Section 20 hereof."

(5) In the second sentence of the last paragraph of Section 16, the phrase "calendar year" appearing in two places in said sentence shall be stricken out and the phrase "contract year" inserted in lieu thereof in both places;

(6) Subparagraph (2) of Section 20 shall be modified to read as follows:

(2) That any hardboard products heretofore shipped by the Manufacturer to the Factor or to any existing selling agent of the Factor and unsold on the effective date of this Agreement shall be accounted for as if shipped under this Agreement, provided that, if advances have been made by the Factor pursuant

to paragraph "8" of said prior agreement, then such advances shall stand as a credit in favor of the Factor in making settlement due under paragraph (2) of Section 7 of this Agreement;

(7) Subparagraphs (3) and (4) of said Section 20 shall be stricken out in their entirety and subparagraphs (3), (4), and (5) inserted in lieu thereof, reading as follows:

(3) That as to hardboard products sold by the Factor prior to the effective date of this Agreement but not on such effective date reported and fully accounted for, all advances or payments due to the Manufacturer and such commissions as may be due the Factor under the "First Bracket" of paragraph "9" of said prior agreement shall be settled and accounted for pursuant to the provisions of said prior agreement;

(4) That for the purpose of determining the applicable footage bracket, and the applicable percentage rates under paragraph "(5)" of Section 7 of this Agreement, the first contract year under this Agreement shall be deemed to be the twelve months' period beginning on September 1, 1936, and ending on August 31, 1937, and the graduated additional commission for such first contract year under this Agreement shall be determined as follows:

1st. The total number of square feet, surface measurement, of all hardboard products sold by the Factor under the above mentioned prior agreement and under this Agreement for the twelve months' period beginning September 1, 1936, and ending August 31, 1937, shall be computed and the applicable footage bracket under paragraph "(5)" of Section 7 of this Agreement thereby determined;

2nd. The commissions which would be payable on account of the respective hardboard products so sold at the respective percentage rates set forth in paragraph "(5)" of Section 7 of this Agreement, computed on the respective car lot list prices to dealers and/or on the special separate fabricators' price list as to Special Concrete Form Board (excluding all wrapping, tempering, processing and other special charges which carry a flat commission only) in effect at the respective dates of sale of said products shall then be determined:

3rd. The difference between the amount so determined under the foregoing clause "2nd" and the amount retained by the Factor pursuant to the "First Bracket" of paragraph "9" of said prior agreement as to current commissions on sales made from September 1, 1936, to the effective date of this Agreement plus the amount retained by the Factor under paragraph "(1)" of Section 7 of this Agreement as current commissions on sales made on and subsequent to the effective date of this Agreement and down to and including August 31, 1937, shall constitute the graduated commission for such first contract year.

(5) That as to sales of hardboard products made prior to September 1, 1936, under the aforesaid prior agreement and during the contract year which was running and became terminated and cancelled upon the effective date of this Agreement, the Manufacturer will, as soon as practicable, and not more than sixty (60) days after the effective date of this Agreement, (a) compute the total number of square feet of the respective hardboard products sold by the Factor from the beginning of such contract year under said prior agreement down to and including August 31, 1936, (b) compute the total number of square feet of the respective hardboard products sold by the Factor from the beginning of such contract year down to the effective date of this Agreement and determine the bracket which would have been applicable under said prior agreement if sales had been continued at the same square foot volume for the respective hard board products for an entire twelve months' period and (c) apply to the total number of square feet computed under "(a)" above the percentages of the aggregate footage bracket of the prior agreement applicable to the computation under "(b)" above, and make settlement with the Factor for the amount so found to be due after taking into account the current commissions retained by the Factor on account of such sales as provided in paragraph "9" of said prior agreement.

If the above is in accordance with your understanding of the matters referred to, will you please indicate your approval by signing a duplicate of this letter and returning one of such signed duplicates to us, whereupon the same will constitute an understanding and agreement between us as to said matters.

Dated at Chicago, Illinois, this 29th day of October 1936.

Respectfully submitted.

MASONITE CORPORATION,
(Signed) By R. G. WALLACE,
Vice President.

The foregoing are approved and accepted as above set forth this 29th day of October 1936.

JOHNS-MANVILLE SALES CORPORATION,
(Signed) By L. R. HOFF, *President.*

SUPPLEMENTAL AGREEMENT TO DEL CREDERE FACTOR'S AGREEMENT BETWEEN MASONITE CORPORATION AND NATIONAL GYPSUM COMPANY

Dated October 29, 1936

NATIONAL GYPSUM COMPANY,
Buffalo, New York.

GENTLEMEN: Referring to the new del credere Factor's Agreement between Masonite Corporation as the Manufacturer and

standards of requirements for each such classification, respectively, as it is at the time imposing on the Factor.

2. Referring to Section 24, paragraph (o), of said Del Credere Factor's Agreement, Masonite Corporation agrees to continue to recognize Huttig Sash and Door Company, a Delaware corporation having its principal place of business at St. Louis, Missouri (including the following subsidiary companies of Huttig Sash and Door Company, namely Memphis Sash and Door Company of Memphis, Tennessee, Birmingham Sash and Door Company of Birmingham, Alabama, and Huttig Sash and Door Company of Texas, Dallas, Texas), The Paraffine Companies, Inc., a Delaware corporation, having its principal place of business at San Francisco, California, and The Flintkote Company, a Massachusetts corporation having its principal place of business in New York City, as Selling Agents of The Insulite Company, and that such recognition shall continue in effect as to each such company so long as it remains the duly appointed Selling Agent of The Insulite Company and so long as it observes and adheres to all of the terms and provisions of the aforesaid Del Credere Agreement. Masonite Corporation further agrees that so long as each such Selling Agent is so recognized and continues to be so recognized as aforesaid, it will not sell any of its products covered by said Del Credere Agreement direct to such Selling Agent.

3. Referring to the provisions of Section 24 of said Del Credere Factor's Agreement, pursuant to which Masonite Corporation reserves the right to determine who shall be classified as a wholesaler, jobber, selling agent or reserve and of acceptance, approval or disapproval of appointments proposed to be made by the Factor, Masonite Corporation agrees that appointments proposed to it by The Insulite Company will be acted upon with customary business diligence and without undue delay.

4. The Del Credere Agreement and Schedule II annexed thereto provide that Black Tempered Presdwood and Special Concrete Form Board are special products of the Manufacturer which may either be discontinued or which may from time to time not be available. If, at any time, while said Del Credere Agreement is in force and effect the Manufacturer shall determine to discontinue the manufacturing and/or sale of either of these products to the classes of trade to which the Factor is permitted to sell under said Agreement, it will give the Factor thirty (30) days written notice of such discontinuance and if at any time or from time to time while this Agreement remains in force and effect either of such products shall not be available for sale to the classes of trade to which the Factor is permitted to sell, it will give to the Factor ten (10) days written notice of the fact that either

or both of said products are not so available, as the case may be.

5. In Section 16 of said Del Credere Factor's Agreement with respect to the rights and obligations of the parties to said agreement in the event of cancellation, it is provided, among other things, as follows:

"However, at the option of the Manufacturer, it will return to the Manufacturer all or such portion of undamaged standard sized hardboards and 'longs' as the Manufacturer shall request, and shall account for and pay over to the Manufacturer, in respect of such other hardboard products as the Factor or its selling agents may have on hand, as though such hardboard products were sold. As to all hardboard products so returned, the Manufacturer shall refund to the Factor any advances which may have been made by the Factor to the Manufacturer on account thereof."

The Manufacturer agrees that in event it shall exercise the option as set forth in the above quoted language to require the Factor to return undamaged longs, there shall also be returned therewith an amount of shorts (which may be diversified between 2′ x 4′, 3′ x 4′ and 4′ x 4′ sizes) corresponding to the footage which was cut from the longs so returned.

If the above is in accordance with your understanding of the matters referred to, will you please indicate your approval by signing a duplicate of this letter and returning one of such signed duplicates to us, whereupon the same will constitute an understanding and agreement between us as to the said matters.

Dated at Chicago, Illinois, this 29th day of October 1936.

Respectfully submitted.

MASONITE CORPORATION,
(Signed) By BEN ALEXANDER,
President.

The foregoing are approved and accepted as above set forth this 29th day of October 1936.

THE INSULITE COMPANY,
(Signed) By R. H. M. ROBINSON,
President.

III

THE INSULITE COMPANY,

Builders Exchange Building, Minneapolis, Minnesota.

GENTLEMEN. Referring to the new del credere Factor's Agreement between Masonite Corporation as the Manufacturer and The Insulite Company as the del credere Factor, of even date herewith,

and particularly to the provisions thereof relating to the termination of the "Agency Agreement and License Option" referred to in Section 20 of the new del credere agreement and to various provisions with respect to the graduated additional commission to be paid to the Factor as provided in Section 7 of said agreement, Masonite desires to adjust the accounting on such graduated commission to conform to its fiscal year. Accordingly, it is agreed that said del credere agreement shall be, and the same is hereby, modified in the following respects, to-wit:

(1) In clause (b) in the first paragraph of Section 7 the phrase "calendar year" shall be stricken out and the phrase "contract year" inserted in lieu thereof;

(2) In paragraph numbered (5) of Section 7 the phrase "calendar year" appearing in the sentence immediately preceding the schedule of footage brackets and percentages shall be stricken out and the phrase "contract year" inserted in lieu thereof;

(3) In paragraph numbered (5) of Section 7 the phrase "calendar year" appearing in two places in the sentence immediately following the schedule of footage brackets and the percentages shall be stricken out and the phrase "contract year" inserted in lieu thereof in both places;

(4) In subparagraph numbered 3rd, being the sub-paragraph immediately preceding the last paragraph of Section 7, the phrase reading, "shall constitute the graduated commission to be paid by the Manufacturer to the Factor" shall be changed so as to read, "shall constitute the graduated commission for such contract year to be paid by the Manufacturer to the Factor, except that for the first contract year the computation shall be as provided in Section 20 hereof."

(5) In the second sentence of the last paragraph of Section 16, the phrase "calendar year" appearing in two places in said sentence shall be stricken out and the phrase "contract year" inserted in lieu thereof in both places;

(6) Subparagraph (2) of Section 20 shall be modified to read as follows:

(2) That any hardboard products heretofore shipped by the Manufacturer to the Factor or to any existing selling agent of the Factor and unsold on the effective date of this Agreement shall be accounted for as if shipped under this Agreement, provided that, if advances have been made by the Factor pursuant to paragraph "8" of said prior agreement, then such advances shall stand as a credit in favor of the Factor in making settlement due under paragraph (2) of Section 7 of this Agreement;

(7) Subparagraphs (3) and (4) of said Section 20 shall be stricken out in their entirety and subparagraphs (3), (4), and (5) inserted in lieu thereof, reading as follows:

(3) That as to hardboard products sold by the Factor prior to the effective date of this Agreement but not on such effective date reported and fully accounted for, all advances or payments due to the Manufacturer and such commissions as may be due to the Factor under the "First Bracket" of paragraph "9" of said prior agreement shall be settled and accounted for pursuant to the provisions of said prior agreement;

(4) That for the purpose of determining the applicable footage bracket, and the applicable percentage rates under paragraph "(5)" of Section 7 of this Agreement, the first contract year under this Agreement shall be deemed to be the twelve months' period beginning on September 1, 1936, and ending on August 31, 1937, and the graduated additional commission for such first contract year under this Agreement shall be determined as follows:

1st. The total number of square feet, surface measurement, of all hardboard products sold by the Factor under the above mentioned prior agreement and under this Agreement for the twelve months' period beginning September 1, 1936, and ending August 31, 1937, shall be computed and the applicable footage bracket under paragraph "(5)" of Section 7 of this Agreement thereby determined;

2nd. The commissions which would be payable on account of the respective hardboard products so sold at the respective percentage rates set forth in paragraph "(5)" of Section 7 of this Agreement, computed on the respective car lot list prices to dealers and/or on the special separate fabricators' price list as to Special Concrete Form Board (excluding all wrapping, tempering, processing, and other special charges which carry a flat commission only) in effect at the respective dates of sale of said products shall then be determined;

3rd. The difference between the amount so determined under the forgoing clause "2nd" and the amount retained by the Factor pursuant to the "First Bracket" of paragraph "9" of said prior agreement as to current commissions on sales made from September 1, 1936, to the effective date of this Agreement plus the amount retained by the Factor under paragraph "(1)" of Section 7 of this Agreement as current commissions on sales made on and subsequent to the effective date of this Agreement and down to and including August 31, 1937, shall constitute the graduated commission for such first contract year.

(5) That as to sales of hardboard products made prior to September 1, 1936, under the aforesaid prior agreement and during the contract year which was running and became terminated and cancelled upon the effective date of this Agreement, the Manufacturer will, as soon as practicable, and not more than sixty (60) days after the effective date of this Agreement, (a) compute the total number of square feet of the respective hardboard products

sold by the Factor from the beginning of such contract year under said prior agreement down to and including August 31, 1936, (b) compute the total number of square feet of the respective hardboard products sold by the Factor from the beginning of such contract year down to the effective date of this Agreement and determine the bracket which would have been applicable under said prior agreement if sales had been continued at the same square foot volume for the respective hardboard products for an entire twelve months' period, and (c) apply to the total number of square feet computed under "(a)" above the percentages of the aggregate footage bracket of the prior agreement applicable to the computation under "(b)" above, and make settlement with the Factor for the amount so found to be due after taking into account the current commissions retained by the Factor on account of such sales as provided in paragraph "9" of said prior agreement.

If the above is in accordance with your understanding of the matters referred to, will you please indicate your approval by signing a duplicate of this letter and returning one of such signed duplicates to us, whereupon the same will constitute an understanding and agreement between us as to said matters.

Dated at Chicago, Illinois, this 29th day of October 1936.

Respectfully submitted.

MASONITE CORPORATION,
(Signed) By BEN ALEXANDER, *President.*

The foregoing are approved and accepted as above set forth this 29th day of October 1936.

THE INSULITE COMPANY,
(Signed) By R. H. M. ROBINSON,
President.

IV

THE INSULITE COMPANY,
1100 Builders Exchange Building, Minneapolis, Minn.

GENTLEMEN. Referring to the new del credere Factors Agreement between Masonite Corporation and The Insulite Company, of even date herewith, and referring to that certain Export Agreement between Masonite Corporation and The Insulite Company, dated February 2, 1935, and a Supplemental Agreement thereto dated February 8, 1935, it appears that said Export Agreement was originally entered into in connection with the execution of the "Agency Agreement and License Option" between Masonite Corporation and The Insulite Company dated February 2, 1935, which last named agreement will be cancelled and superseded by the execution and delivery of the new del credere Factors Agreement of even date herewith.

Said Export Agreement dated February 2, 1935, contains a paragraph number 8 reading as follows:

"This agreement shall not be assignable without the consent of Masonite and shall be cancellable by either party on thirty days' notice on or after the expiration or cancellation of said Agency Agreement between the parties hereto dated February 2nd, 1935."

Accordingly, and in consideration of the execution of said new del credere Factors Agreement, it is hereby further understood and agreed between us that said Export Agreement be, and the same is modified and amended by striking out said paragraph number 8 as above quoted, and inserting in lieu thereof the following new paragraph number 8, to wit:

"This agreement shall not be assignable without the consent of Masonite and shall be cancellable by either party on thirty days' notice on or after the expiration or cancellation of the del credere Factors Agreement between Masonite Corporation and The Insulite Company, of even date herewith"

and that as so amended said Export Agreement dated February 2, 1935, and the supplement thereto dated February 8, 1935, shall continue in full force and effect according to the terms and provisions thereof.

If the above is in accordance with your understanding, will you please indicate your approval by signing a duplicate of this letter and return one of such signed duplicates to us, whereupon the same will constitute an agreement between us modifying said Export Agreement as above set forth.

Dated at Chicago, Illinois, this 29th day of October, 1936.

Respectfully submitted,

MASONITE CORPORATION,
(Signed) By R. G. WALLACE,
Vice President.

The foregoing approved and accepted as above set forth this 29th day of October 1936.

THE INSULITE COMPANY,
(Signed) By R. H. M. ROBINSON,
President.

SUPPLEMENTAL AGREEMENT TO DEL CREDERE FACTOR'S AGREEMENT BETWEEN MASONITE CORPORATION AND JOHNS-MANVILLE SALES CORPORATION

Dated October 29, 1936

JOHNS-MANVILLE SALES CORPORATION,
22 East 40th Street, New York, N. Y.

GENTLEMEN. Referring to the new del credere Factor's Agreement between Masonite Corporation as the Manufacturer and

Johns-Manville Sales Corporation as the del credere Factor of even date herewith, and to our conversations concerning certain points which you felt should be subject to clarification, and in consideration of the execution of said del credere Factor's Agreement, it is further understood and agreed between us as follows:

1. Referring to the first paragraph of Section 17 of said del credere Agreement, the Manufacturer agrees that said paragraph shall not be construed as granting a license to the Manufacturer under any patent or patent rights now or hereafter owned by the Factor or by any of its subsidiary or affiliated companies.

2. Referring to the last sentence of Section 24 of said del credere Agreement, the Manufacturer further agrees that it will not, directly or indirectly, use the authority reserved to it to modify the standard of requirements for dealer classification as set forth in subparagraph (m) of said Section 24, for the purpose or with the intent of diverting customers or business from the Factor to the Manufacturer or from one factor to another factor.

3. Referring to the various classes of trade to which the Factor is entitled to sell Masonite's hardboard products as specified in Section 9 of said del credere Factor's Agreement and as defined in Section 24 of said Agreement, the Manufacturer agrees that it will impose and observe, as to its own dealers, wholesalers and jobbers, reserves and as to any selling agents which it may appoint, like standards of requirements for each such classification, respectively, as it is at the time imposing on the Factor.

4. Referring to the provisions of Section 24 of said del credere Factor's Agreement, pursuant to which Masonite reserves the right to determine who shall be classified as a wholesaler, jobber, selling agent or reserve and of acceptance, approval or disapproval of appointments proposed to be made by the Factor, Masonite agrees that appointments proposed to it by Johns-Manville Sales Corporation will be acted upon at all times with reasonable business diligence and without undue delay.

5. By Section 4 of said del credere Agreement, it is provided, among other things, as follows:

"The Factor further agrees to procure and carry, at its own expense, adequate insurance against the usual hazards incident to the transportation and storage of all hardboard products shipped to it or its selling agents, and all insurance policies for such coverage shall be made payable to the Manufacturer and the Factor as their respective interests may appear."

It is hereby agreed that the foregoing provision shall not require your company, as del credere Factor, to take out new insurance or to make any changes in its policies of insurance now in effect, it being understood that your company carries general insurance of the so-called "Floater" type; and it also being understood that

your company agrees to indemnify Masonite Corporation for any losses caused by the usual hazards referred to in said Section 4 of said del credere Agreement.

6. With respect to the provisions of said del credere Agreement relating to the termination of the "Agency Agreement and License Option" and agreements supplemental thereto, referred to in Section 20 of the new del credere Agreement of even date herewith and to various provisions with respect to the graduated additional commission to be paid to the Factor as provided in Section 7 of said Agreement, Masonite desires to adjust the accounting on such graduated commission to conform to its fiscal year. Accordingly, it is agreed that said del credere Agreement shall be and the same is hereby modified in the following respects, to-wit:

(1) In clause (b) in the first paragraph of Section 7 the phrase "calendar year" shall be stricken out and the phrase "contract year" inserted in lieu thereof;

(2) In paragraph numbered (5) of Section 7 the phrase "calendar year" appearing in the sentence immediately preceding the schedule of footage brackets and percentages shall be stricken out and the phrase "contract year" inserted in lieu thereof;

(3) In paragraph numbered (5) of Section 7 the phrase "calendar year" appearing in two places in the sentence immediately following the schedule of footage brackets and percentages shall be stricken out and the phrase "contract year" inserted in lieu thereof in both places;

(4) In subparagraph numbered 3rd, being the subparagraph immediately preceding the last paragraph of Section 7, the phrase reading, "shall constitute the graduated commission to be paid by the Manufacturer to the Factor" shall be changed so as to read, "shall constitute the graduated commission for such contract year to be paid by the Manufacturer to the Factor, except that for the first contract year the computation shall be as provided in Section 20 hereof."

(5) In the second sentence of the last paragraph of Section 16, the phrase "calendar year" appearing in two places in said sentence shall be stricken out and the phrase "contract year" inserted in lieu thereof in both places;

(6) Subparagraph (2) of Section 20 shall be modified to read as follows:

(2) That any hardboard products heretofore shipped by the Manufacturer to the Factor or to any existing selling agent of the Factor and unsold on the effective date of this Agreement shall be accounted for as if shipped under this Agreement, provided that, if advances have been made by the Factor pursuant

to paragraph "8" of said prior agreement, then such advances shall stand as a credit in favor of the Factor in making settlement due under paragraph (2) of Section 7 of this Agreement;

(7) Subparagraphs (3) and (4) of said Section 20 shall be stricken out in their entirety and subparagraphs (3), (4), and (5) inserted in lieu thereof, reading as follows:

(3) That as to hardboard products sold by the Factor prior to the effective date of this Agreement but not on such effective date reported and fully accounted for, all advances or payments due to the Manufacturer and such commissions as may be due the Factor under the "First Bracket" of paragraph "9" of said prior agreement shall be settled and accounted for pursuant to the provisions of said prior agreement;

(4) That for the purpose of determining the applicable footage bracket, and the applicable percentage rates under paragraph "(5)" of Section 7 of this Agreement, the first contract year under this Agreement shall be deemed to be the twelve months' period beginning on September 1, 1936, and ending on August 31, 1937, and the graduated additional commission for such first contract year under this Agreement shall be determined as follows:

1st. The total number of square feet, surface measurement, of all hardboard products sold by the Factor under the above mentioned prior agreement and under this Agreement for the twelve months' period beginning September 1, 1936, and ending August 31, 1937, shall be computed and the applicable footage bracket under paragraph "(5)" of Section 7 of this Agreement thereby determined;

2nd. The commissions which would be payable on account of the respective hardboard products so sold at the respective percentage rates set forth in paragraph "(5)" of Section 7 of this Agreement, computed on the respective car lot list prices to dealers and/or on the special separate fabricators' price list as to Special Concrete Form Board (excluding all wrapping, tempering, processing and other special charges which carry a flat commission only) in effect at the respective dates of sale of said products shall then be determined:

3rd. The difference between the amount so determined under the foregoing clause "2nd" and the amount retained by the Factor pursuant to the "First Bracket" of paragraph "9" of said prior agreement as to current commissions on sales made from September 1, 1936, to the effective date of this Agreement plus the amount retained by the Factor under paragraph "(1)" of Section 7 of this Agreement as current commissions on sales made on and subsequent to the effective date of this Agreement and down to and including August 31, 1937, shall constitute the graduated commission for such first contract year.

(5) That as to sales of hardboard products made prior to September 1, 1936, under the aforesaid prior agreement and during the contract year which was running and became terminated and cancelled upon the effective date of this Agreement, the Manufacturer will, as soon as practicable, and not more than sixty (60) days after the effective date of this Agreement, (a) compute the total number of square feet of the respective hardboard products sold by the Factor from the beginning of such contract year under said prior agreement down to and including August 31, 1936, (b) compute the total number of square feet of the respective hardboard products sold by the Factor from the beginning of such contract year down to the effective date of this Agreement and determine the bracket which would have been applicable under said prior agreement if sales had been continued at the same square foot volume for the respective hard board products for an entire twelve months' period and (c) apply to the total number of square feet computed under "(a)" above the percentages of the aggregate footage bracket of the prior agreement applicable to the computation under "(b)" above, and make settlement with the Factor for the amount so found to be due after taking into account the current commissions retained by the Factor on account of such sales as provided in paragraph "9" of said prior agreement.

If the above is in accordance with your understanding of the matters referred to, will you please indicate your approval by signing a duplicate of this letter and returning one of such signed duplicates to us, whereupon the same will constitute an understanding and agreement between us as to said matters.

Dated at Chicago, Illinois, this 29th day of October 1936.

Respectfully submitted.

MASONITE CORPORATION,

(Signed) By R. G. WALLACE,

Vice President.

The foregoing are approved and accepted as above set forth this 29th day of October 1936.

JOHNS-MANVILLE SALES CORPORATION,

(Signed) By L. R. HOFF, *President.*

SUPPLEMENTAL AGREEMENT TO DEL CREDERE FACTOR'S AGREEMENT BETWEEN MASONITE CORPORATION AND NATIONAL GYPSUM COMPANY

Dated October 29, 1936

NATIONAL GYPSUM COMPANY,

Buffalo, New York.

GENTLEMEN: Referring to the new del credere Factor's Agreement between Masonite Corporation as the Manufacturer and

National Gypsum Company as the del credere Factor, of even date herewith, and particularly to the provisions thereof relating to the termination of the "Agency Agreement and License Option" referred to in Section 20 of the new del credere agreement and to various provisions with respect to the graduated additional commission to be paid to the Factor as provided in Section 7 of said agreement, Masonite desires to adjust the accounting on such graduated commission to conform to its fiscal year. Accordingly, it is agreed that said del credere agreement shall be, and the same is hereby, modified in the following respects, to wit:

(1) In clause (b) in the first paragraph of Section 7 the phrase "calendar year" shall be stricken out and the phrase "contract year" inserted in lieu thereof;

(2) In paragraph numbered (5) of Section 7 the phrase "calendar year" appearing in the sentence immediately preceding the schedule of footage brackets and percentages shall be stricken out and the phrase "contract year" inserted in lieu thereof;

(3) In paragraph numbered (5) of Section 7 the phrase "calendar year" appearing in two places in the sentence immediately following the schedule of footage brackets and the percentages shall be stricken out and the phrase "contract year" inserted in lieu thereof in both places;

(4) In subparagraph numbered 3rd, being the subparagraph immediately preceding the last paragraph of Section 7, the phrase reading, "shall constitute the graduated commission to be paid by the Manufacturer to the Factor" shall be changed so as to read, "shall constitute the graduated commission for such contract year to be paid by the Manufacturer to the Factor, except that for the first contract year the computation shall be as provided in Section 20 hereof."

(5) In the second sentence of the last paragraph of Section 16, the phrase "calendar year" appearing in two places in said sentence shall be stricken out and the phrase "contract year" inserted in lieu thereof in both places;

(6) Subparagraph (2) of Section 20 shall be modified to read as follows:

(2) That any hard board products heretofore shipped by the Manufacturer to the Factor or to any existing selling agent of the Factor and unsold on the effective date of this Agreement shall be accounted for as if shipped under this Agreement, provided that, if advances have been made by the Factor pursuant to paragraph "8" of said prior agreement, then such advances shall stand as a credit in favor of the Factor in making settlement due under paragraph (2) of Section 7 of this Agreement;

(7) Subparagraphs (3) and (4) of said Section 20 shall be

stricken out in their entirety and subparagraphs (3), (4), and (5) inserted in lieu thereof, reading as follows:

(3) That as to hard board products sold by the Factor prior to the effective date of this Agreement but not on such effective date reported and fully accounted for, all advances or payments due to the Manufacturer and such commissions as may be due the Factor under the "First Bracket" of paragraph "9" of said prior agreement shall be settled and accounted for pursuant to the provisions of said prior agreement;

(4) That for the purpose of determining the applicable footage bracket, and the applicable percentage rates under paragraph "(5)" of Section 7 of this Agreement, the first contract year under this Agreement shall be deemed to be the twelve months' period beginning on September 1, 1936, and ending on August 31, 1937, and the graduated additional commission for such first contract year under this Agreement shall be determined as follows:

1st. The total number of square feet, surface measurement, of all hardboard products sold by the Factor under the above mentioned prior agreement and under this Agreement for the twelve months' period beginning September 1, 1936, and ending August 31, 1937, shall be computed and the applicable footage bracket under paragraph "(5)" of Section 7 of this Agreement thereby determined;

2nd. The commissions which would be payable on account of the respective hardboard products so sold at the respective percentage rates set forth in paragraph "(5)" Section 7 of this Agreement, computed on the respective car lot list prices to dealers and/or on the special separate fabricators' price list as to Special Concrete Form Board (excluding all wrapping, tempering, processing and other special charges which carry a flat commission only) in effect at the respective dates of sale of said products shall then be determined;

3rd. The difference between the amount so determined under the foregoing clause "2nd" and the amount retained by the Factor pursuant to the "First Bracket" of paragraph "9" of said prior agreement as to current commissions on sales made from September 1, 1936, to the effective date of this Agreement plus the amount retained by the Factor under paragraph "(1)" of Section 7 of this Agreement as current commissions on sales made on and subsequent to the effective date of this Agreement and down to and including August 31, 1937, shall constitute the graduated commission for such first contract year.

(5) That as to sales of hardboard products made prior to September 1, 1936, under the aforesaid prior agreement and during the contract year which was running and became terminated and cancelled upon the effective date of this Agreement, the Manu-

facturer ill, as soon as practicable, and not more than sixty (60) days after the effective date of this Agreement, (a) compute the total number of square feet of the respective hardboard products sold by the Factor from the beginning of such contract year under said prior agreement down to and including August 31, 1936, (b) compute the total number of square feet of the respective hardboard products sold by the Factor from the beginning of such contract year down to the effective date of this Agreement and determine the bracket which would have been applicable under said prior agreement if sales had been continued at the same square foot volume for the respective hardboard products for an entire twelve months' period, and (c) apply to the total number of square feet computed under "(a)" above the percentages of the aggregate footage bracket of the prior agreement applicable to the computation under "(b)" above, and make settlement with the Factor for the amount so found to be due after taking into account the current commissions retained by the Factor on account of such sales as provided in paragraph "9" of said prior agreement.

If the above is in accordance with your understanding of the matters referred to, will you please indicate your approval by signing a duplicate of this letter and returning one of such signed duplicates to us, whereupon the same will constitute an understanding and agreement between us as to said matters.

Dated at Chicago, Illinois, this 29th day of October 1936.

Respectfully submitted.

MASONITE CORPORATION,

(Signed) By R. G. WALLACE,

Vice President.

The foregoing are approved and accepted as above set forth this 29th day of October 1936.

NATIONAL GYPSUM COMPANY,

(Signed) By M. H. BAKER, *President.*

SUPPLEMENTAL AGREEMENT TO DEL CREDERE FACTOR'S AGREEMENT BETWEEN MASONITE CORPORATION AND WOOD CONVERSION COMPANY

Dated October 29, 1936

WOOD CONVERSION COMPANY, *Cloquet, Minnesota.*

GENTLEMEN: Referring to the new del credere Factor's Agreement between Masonite Corporation as the Manufacturer and Wood Conversion Company as the del credere Factor, of even date herewith, and to our conversations concerning certain points which you feel should be subject to clarification, and in consideration of the execution of said del credere Factor's Agreement, it is further understood and agreed between us as follows:

1. Referring to the various classes of trade to which the Factor is entitled to sell Masonite's hard board products as specified in Section 9 of said del credere Factor's Agreement and as defined in Section 24 of said Agreement, the Manufacturer agrees that it will impose and observe, as to its own dealers, wholesalers, and jobbers, reserves and as to any selling agents which it may appoint, like standards of requirements for each such classification, respectively, as it is at the time imposing on the Factor.

2. Referring to the provisions of Section 24 of said del credere Factor's Agreement, pursuant to which Masonite reserves the right to determine who shall be classified as a wholesaler, jobber, selling agent, or reserve, and of acceptance, approval, or disapproval of appointments proposed to be made by the Factor, Masonite agrees that appointments proposed to it by Wood Conversion Company will be acted upon with customary business diligence and without undue delay.

3. The del credere Factor's Agreement and Schedule II annexed thereto provide that Black Tempered Presdwood and Special Concrete Form Board are special products of the Manufacturer which may either be discontinued or which may from time to time not be available. If, at any time, while said del credere Agreement is in force and effect, the Manufacturer shall determine to discontinue the manufacturing and/or sale of either of these products to the classes of trade to which the Factor is permitted to sell under said Agreement, it will give the Factor thirty (30) days' written notice of such discontinuance, and if at any time or from time to time, while this Agreement remains in force and effect, either of such products shall not be available for sale to the classes of trade to which the Factor is permitted to sell, it will give the Factor ten (10) days' written notice of the fact that either or both of said products are not so available, as the case may be.

4. By Section 4 of said del credere Agreement it is provided, among other things, as follows:

"The Factor further agrees to procure and carry, at its own expense, adequate insurance against the usual hazards incident to the transportation and storage of all hard board products shipped to it or its selling agents, and all insurance policies for such coverage shall be made payable to the Manufacturer and the Factor as their respective interests may appear."

It is hereby agreed that the foregoing provision shall not require your company, as del credere Factor, to take out new insurance or to make any changes in its policies of insurance now in effect, it being understood that your company carries general insurance of the so-called "Floater" type; and it also being understood that your company agrees to indemnify Masonite Corporation for any

losses caused by the usual hazards referred to in said Section 4 of said del credere Agreement.

5. With respect to the provisions of said del credere Agreement relating to the termination of the "Agency Agreement and License Option" and agreements supplemental thereto, referred to in Section 20 of the new del credere Agreement of even date herewith and to various provisions with respect to the graduated additional commission to be paid to the Factor as provided in Section 7 of said Agreement, Masonite desires to adjust the accounting on such graduated commission to conform to its fiscal year. Accordingly, it is agreed that said del credere Agreement shall be and the same is hereby modified in the following respects, to wit:

(1) In clause (b) in the first paragraph of Section 7 the phrase "calendar year" shall be stricken out and the phrase "contract year" inserted in lieu thereof;

(2) In paragraph numbered (5) of Section 7 the phrase "calendar year" appearing in the sentence immediately preceding the schedule of footage brackets and percentages shall be stricken out and the phrase "contract year" inserted in lieu thereof;

(3) In paragraph numbered (5) of Section 7 the phrase "calendar year" appearing in two places in the sentence immediately following the schedule of footage brackets and percentages shall be stricken out and the phrase "contract year" inserted in lieu thereof in both places;

(4) In subparagraph numbered 3rd, being the subparagraph immediately preceding the last paragraph of Section 7, the phrase reading, "shall constitute the graduated commission to be paid by the Manufacturer to the Factor" shall be changed so as to read, "shall constitute the graduated commission for such contract year to be paid by the Manufacturer to the Factor, except that for the first contract year the computation shall be as provided in Section 20 hereof."

(5) In the second sentence of the last paragraph of Section 16, the phrase "calendar year" appearing in two places in said sentence shall be stricken out and the phrase "contract year" inserted in lieu thereof in both places;

(6) Subparagraph (2) of Section 20 shall be modified to read as follows:

(2) That any hard board products heretofore shipped by the Manufacturer to the Factor or to any existing selling agent of the Factor and unsold on the effective date of this Agreement shall be accounted for as if shipped under this Agreement, provided that, if advances have been made by the Factor pursuant to paragraph "8" of said prior agreement, then such advances shall stand as a credit in favor of the Factor in making settlement due under paragraph (2) of Section 7 of this Agreement;

(7) Subparagraphs (3) and (4) of said Section 20 shall be stricken out in their entirety and subparagraphs (3), (4), and (5) inserted in lieu thereof, reading as follows:

(3) That as to hard board products sold by the Factor prior to the effective date of this Agreement but not on such effective date reported and fully accounted for, all advances or payments due to the Manufacturer and such commissions as may be due the Factor under the "First Bracket" of paragraph "9" of said prior agreement shall be settled and accounted for pursuant to the provisions of said prior agreement;

(4) That for the purpose of determining the applicable footage bracket, and the applicable percentage rates under paragraph "(5)" of Section 7 of this Agreement, the first contract year under this Agreement shall be deemed to be the twelve months' period beginning on September 1, 1936, and ending on August 31, 1937, and the graduated additional commission for such first contract year under this Agreement shall be determined as follows:

1st. The total number of square feet, surface measurement, of all hard board products sold by the Factor under the above-mentioned prior agreement and under this Agreement for the twelve months' period beginning September 1, 1936, and ending August 31, 1937, shall be computed and the applicable footage bracket under paragraph "(5)" of Section 7 of this Agreement thereby determined;

2nd. The commissions which would be payable on account of the respective hard board products so sold at the respective percentage rates set forth in paragraph "(5)" of Section 7 of this Agreement, computed on the respective car-lot list prices to dealers and/or on the special separate fabricators' price list as to Special Concrete Form Board (excluding all wrapping, tempering, processing, and other special charges which carry a flat commission only) in effect at the respective dates of sale of said products shall then be determined;

3rd. The difference between the amount so determined under the foregoing clause "2nd" and the amount retained by the Factor pursuant to the "First Bracket" of paragraph "9" of said prior agreement as to current commissions on sales made from September 1, 1936, to the effective date of this Agreement plus the amount retained by the Factor under paragraph "(1)" of Section 7 of this Agreement as current commissions on sales made on and subsequent to the effective date of this Agreement and down to and including August 31, 1937, shall constitute the graduated commission for such first contract year.

(5) That as to sales of hard board products made prior to September 1, 1936, under the aforesaid prior agreement and during the contract year which was running and became terminated and cancelled upon the effective date of this Agreement, the Manufacturer will, as soon as practicable, and not more than sixty (60) days after the effective date of this Agreement, (a) compute the total number of square feet of the respective hard board products sold by the Factor from the beginning of such contract year under said prior agreement down to and including August 31, 1936, (b) compute the total number of square feet of the respective hard board products sold by the Factor from the beginning of such contract year down to the effective date of this Agreement and determine the bracket which would have been applicable under said prior agreement if sales had been continued at the same square foot volume for the respective hard board products for an entire twelve months' period, and (c) apply to the total number of square feet computed under "(a)" above the percentages of the aggregate footage bracket of the prior agreement applicable to the computation under "(b)" above, and make settlement with the Factor for the amount so found to be due after taking into account the current commissions retained by the Factor on account of such sales as provided in paragraph "9" of said prior agreement.

If the above is in accordance with your understanding of the matters referred to, will you please indicate your approval by signing a duplicate of this letter and returning one of such signed duplicates to us, whereupon the same will constitute an understanding and agreement between us as to said matters.

Dated at Chicago, Illinois, this 29th day of October 1936.

Respectively submitted.

MASONITE CORPORATION,
(Signed) By R. G. WALLACE,
Vice President.

The foregoing are approved and accepted as above set forth this 29th day of October 1936.

WOOD CONVERSION COMPANY,
(Signed) By R. M. WEYERHAUSER,
President.

356–J *Exhibit S–46*

DEL CREDERE FACTOR'S AGREEMENT BETWEEN MASONITE CORPORATION AS THE MANUFACTURER AND THE FLINTKOTE COMPANY AS DEL CREDERE FACTOR

Dated Mar. 16, 1937

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SUBJECT

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1. List of Patents and Acknowledgement of Validity.
2. Appointment of Factor.
3. Agreement of Manufacturer to Fill Orders; if Orders Exceed Plant Capacity then Prorated.
4. Title to Hard Board Products; Factor to Pay Certain Costs and Charges.
5. Right of Manufacturer to Designate Selling Prices and Terms and Conditions of Sale; Notice of Increase or Decrease in Prices.
6. Factor to Pay all Sales and Excise Taxes and Similar Charges.
7. Factor's Commissions; Remittances of Amounts due Manufacturer; Option to require advances; Annual Settlement.
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DEL CREDERE FACTOR'S AGREEMENT

This Agreement, made this 16th day of March, 1937, by and between Masonite Corporation, a Delaware corporation having its principal sales office at Chicago, Illinois (hereinafter called the "Manufacturer"), party of the first part, and the Flintkote Company, a Massachusetts corporation, having a principal business office at 50 West 50th St., New York, N. Y. (hereinafter called the "Factor"), party of the second part, witnesseth that

Whereas the Manufacturer is engaged in the manufacture and sale of hardboard products and desires to increase its sales of such products in the continental United States; and

Whereas the Factor desires to procure appointment to act as a del credere factor for the Manufacturer, on the terms and conditions hereinafter set forth;

Now, therefore, in consideration of the premises and of the mutual covenants and promises hereinafter set forth, it is hereby agreed by and between the parties hereto as follows:

SECTION 1. A list of the United States Letters Patent owned or controlled by the Manufacturer and under some or all of which the Manufacturer is manufacturing and selling its hardboard products as hereinafter defined is set forth in "Schedule I" annexed hereto and by reference made a part hereof.

List of Patents and Acknowledgement of Validity

So long as this Agreement shall remain in force and effect, the Factor hereby expressly acknowledges the validity of each and all of said Letters Patent, but such acknowledgment of validity shall extend only to the application of the inventions claimed and allowed under said Letters Patent to hardboard products and the manufacture thereof. The Factor agrees that during the time this Agreement shall remain in force and effect it will not, within the scope of the acknowledgment aforesaid, directly or indirectly contest the validity of any of said Letters Patent, or the scope of the claims thereof, or of the title of the Manufacturer thereto.

Nothing in this Agreement shall prevent the determination by a court of competent jurisdiction of all questions of infringement, and (save where the Factor is hereby estopped from denying validity, scope of claims or title) of all questions of validity, scope of claims and title of any Letters Patent owned or controlled by the Manufacturer.

Appointment of Factor

SECTION 2. The Manufacturer hereby appoints _____, a corporation, as a del credere factor, and licenses it to sell, throughout the continental United States, the Manufacturer's hard board products listed on "Schedule II" annexed hereto and by reference made a part hereof, subject and pursuant to the terms and conditions of this Agreement. The Factor agrees to use reasonable diligence and effort to promote and develop the use and sale of said hard board products at all localities in the United States where it is or shall be engaged in selling and distributing its own products. The right of the Manufacturer to sell in competition with the Factor and to appoint other factors or agents for the sale of all or any of its products shall not be deemed limited in any manner.

Agreement of Manufacturer to Fill Orders; if Orders Exceed Plant Capacity Then Prorated

SECTION 3. The Manufacturer agrees to manufacture its hard board products listed on said "Schedule II" and make the same available in the respective standard sizes, as defined in Section 21, paragraph (f) hereof (including "longs" and "shorts" cut from certain of such standard sized products to the extent and subject to the conditions hereinafter provided), in such quantities as may be reasonably required to fill orders therefor received from the Factor; provided, that as to all tempered hard board products, whether colored or uncolored, and as to Special Concrete Form Board, if the Manufacturer shall at any time discontinue the manufacture and/or sale thereof to the classes of trade to which the Factor is permitted to sell as provided in this Agreement, then during the discontinuance of such manufacture and/or sale the Manufacturer shall not be obligated to make such product available to the Factor. Subject to the limitations of this Agreement, the Manufacturer agrees to promptly ship such hard board products to the Factor or to an approved selling agent of the Factor upon orders received by it from the Factor. Subject to the limitations of this Agreement, the Manufacturer will also, at the Factor's request and pursuant to shipping instructions contained in or accompanying orders received from the Factor, ship hard board products direct to Factor's customers.

However, the Manufacturer will accept orders from the Factor for shipments to the Factor's plant or any of its warehouses or for shipment to an approved selling agent of the Factor or for shipment direct to a customer of the Factor in car lots only, but such quantity may be diversified between the various hard board products; provided that with respect to any car routed to the Manufacturer's factory and which arrives partly loaded with the Factor's own merchandise of a character which is permitted to be combined in cars with the Manufacturer's hard board products as hereinafter in this paragraph provided, the Manufacturer will fill orders to complete the loading of such car with such hard board products as the Factor may specify, which quantity or quantities may be diversified as between the various hard board products; and provided, further, that when such completion of loading of a car necessitates the unloading or readjustment in the car of merchandise already in the car and reloading or readjustment pursuant to Factor's instructions, the Manufacturer shall be entitled to make a charge at actual cost to it for labor performed and material used in the unloading and reloading or readjustment of such merchandise. Only fibre board manufactured primarily for the purpose of insulation and regularly sold

by the Factor primarily for such purpose may be combined in cars with the Manufacturer's hard board products.

It is further agreed that the Manufacturer will not be required to accept orders or deliver hard board products at such time or times as all orders received, taken together with its own sales requirements, exceed its normal manufacturing capacity, it being understood and agreed that the Manufacturer is engaged in selling its hard board products on its own account as well as through other factors and agents. However, in event the aggregate sales demand for any hard board product is in excess of the Manufacturer's normal manufacturing capacity for such hard board product, it will, from month to month so long as such condition continues, prorate all shipments of such hard board product, including therein its own direct sales, on the basis of the total volume of orders for such hard board product or products actually received by the Manufacturer, including therein its own direct orders, during the preceding six months' period. During such time as the Factor's inventory of any hard board product exceeds the Factor's previous two months' sales thereof, the Manufacturer shall not be required to ship such hard board product to the Factor. The Manufacturer shall not be liable for failure to deliver, or for delays in deliveries, caused by strikes, riots, lockouts, acts of armed forces, car shortages, fire, floods, storms or other acts beyond its control.

Title to Hard Board Products; Factor to Pay Certain Costs and Charges

SECTION 4. In accordance with the del credere relationship hereby established, it is agreed that title to all of the Manufacturer's hard board products shipped to the Factor or to any approved selling agent of the Factor shall remain in the Manufacturer until sold by the Factor or such selling agent, as the case may be. The Manufacturer will load its hard board products on cars at Manufacturer's factory, and will also load on Factor's trucks at Manufacturer's factory provided that loading on trucks will be made only on order received from Factor for not less than a car lot quantity, it being agreed, however, that as to all shipments to the Factor or any approved selling agent (regardless of the method of transportation) the Factor shall be responsible for and shall pay, or cause to be paid, all freight and transportation costs incurred on account thereof. The Factor further agrees to procure and carry, at its own expense, adequate insurance against the usual hazards incident to the possession and storage of all hard board products shipped to it or its selling agents, and all insurance policies for such coverage shall be

made payable to the Manufacturer and the Factor as their respective interests may appear; provided, that if the Factor is carrying and maintaining in effect adequate general insurance of the so-called "Floater" type, then it shall not be required to take out new insurance or change its existing "Floater" type policies; it being further understood that, regardless of the form or amount of insurance carried, the Factor will indemnify the Manufacturer for any losses caused by the usual hazards above mentioned. As to hard board products shipped direct to Factor's customers pursuant to shipping instructions contained in or accompanying Factor's orders, title shall pass f. o. b. cars at Manufacturer's factory, but all such products shall be invoiced to the Factor notwithstanding form of bill of lading. With respect to all such shipments direct to Factor's customers, the Factor shall be responsible for and shall pay, or cause to be paid, all freight and transportation costs incurred on account thereof.

In addition to freight and transportation costs and insurance as above provided, the Factor assumes and agrees to pay, or cause to be paid, and hereby indemnifies the Manufacturer against, all charges for storage and cartage on all hard-board products shipped to it or any approved selling agent and all expenses incurred in connection with the sale of hard-board products, it being understood and agreed that the Factor's commissions, as hereinafter provided, take into consideration the Factor's liability for all of the aforesaid costs, charges, and expenses.

The Factor also agrees to indemnify the Manufacturer against all damages resulting from injury to persons or property arising out of the handling by the Factor or by any selling agent of the Factor of Manufacturer's hard-board products, together with all costs and expenses, including reasonable attorney's fees, which the Manufacturer may incur by reason of any claim asserted for such damages.

Right of Manufacturer to Designate Selling Prices and Terms and Conditions of Sale; Notice of Increase or Decrease in Prices

SECTION 5. The Manufacturer shall from time to time designate, fix, and promptly communicate to the Factor the respective minimum selling prices, the respective maximum terms of sale and the conditions of sale at which the Factor shall sell the various hard-board products of the Manufacturer which the Factor shall be entitled to sell hereunder (except with respect to the sale of "shorts" as otherwise permitted by Section 9 hereof) to the respective classes of trade to which the Factor is permitted to sell as hereinafter set forth, and the right to change any of such selling prices, terms of

sale or conditions of sale is vested exclusively in the Manufacturer. Said minimum selling prices to be observed by the Factor are, in each instance and as to each class of trade to which the Factor is permitted to sell, to be the prices appearing in the Manufacturer's current price lists applicable to such respective classes of trade, subject to the terms and conditions thereof, it being understood and agreed that said minimum selling prices, maximum terms of sale and conditions of sale need not be uniform throughout the entire territory within which the Factor is permitted to sell as herein provided, but that the Manufacturer shall have the right to establish territorial areas from time to time as it may determine, in respect of any which territorial area the minimum selling prices, maximum terms of sale and/or conditions of sale may differ from those in effect in other areas. However, the Manufacturer covenants and agrees that the respective minimum selling price, the respective maximum terms of sale and the conditions of sale so designated and fixed with respect to each of said hard-board products and with respect to each territorial area established by it shall be the respective minimum selling price, respective maximum terms of sale and conditions of sale at which the Manufacturer is at the time either making offers to sell or making sales of such respective hard-board products to its customers located in such respective territorial areas and belonging to the classes of trade corresponding to those to which the Factor may sell as aforesaid.

In the event that the minimum selling prices for wholesalers and jobbers or reserves as fixed and designated by the Manufacturer shall be less than 90 percent of the current list prices at the time in effect for dealers, then as to all sales made by the Factor to wholesalers and jobbers or to reserves while such lesser minimum selling prices are in effect, the Factor shall be allowed to retain, in addition to its regular current commissions on such sales as hereinafter in Section 7 provided, one-half of the difference between such minimum selling prices to wholesalers and jobbers or to reserves, as the case may be, and the aforesaid 90 percent of the current list prices for dealers.

The Manufacturer agrees to give the Factor not less than ten (10) days' notice of any increase in selling prices or of any less favorable terms of sale or conditions of sale. The increased selling prices and any less favorable terms of sale or conditions of sale shall take effect and apply to all shipments made after the tenth day following the day of the giving of notice by the Manufacturer to the Factor, excepting only (1) shipments to fill *bona fide* orders which shall have been actually received and accepted by the Factor prior to the receipt of such notice and either (a) actually filled by shipment from Factor's plant or warehouse within the thirty (30) day period following the day of receipt by the Factor of such notice

or (b) ordered to be shipped from Manufacturer's factory, provided that any such order shall direct actual shipment within said thirty (30) day period, and (2) shipments to fill orders received by Factor from its customers prior to the effective date of such increase, which orders shall be filled by shipment within thirty (30) days from the effective date of such price increase, or, if such orders are to be filled from Manufacturer's factory, shall have been ordered by the Factor prior to the effective date of such price increase with instructions for shipment within thirty (30) days from the effective date of such price increase. In event of any decrease in selling prices or of any more favorable terms of sale or conditions of sale, the Manufacturer agrees to give the Factor at least forty-eight (48) hours' notice thereof. The decreased selling prices and more favorable terms of sale or conditions of sale shall take effect and apply to (a) all hardboard products in the hands of the Factor or any approved selling agent or in transit from the Manufacturer to the Factor or any approved selling agent and unsold on the date such change became effective, (b) all hardboard products included in orders received from the Factor and not shipped by the Manufacturer prior to said date, and (c) all hardboard products shipped by the Factor or any approved selling agent to its or their customers or on the order of the Factor direct to its customers and not delivered on said date, provided evidence is furnished in the form of carriers expense bill indicating that such products were actually in transit and not delivered prior to said date.

All notices of change in selling price or terms of sale or conditions of sale shall be given by the Manufacturer to the Factor by telegraph timed to be delivered in the normal course of telegraphic delivery as near as may be to the close of a business day, and Manufacturer agrees not to release such changes to its own sales organization or its own customers until at the opening of business on the first business day following the sending of such telegraphic notices. However, the Manufacturer shall not be liable to the Factor for any failure to deliver, or delay in delivery by, the telegraph company of any such notice.

Factor to Pay All Sales and Excise Taxes and Similar Charges

SECTION 6. Any sales tax, manufacturers' occupational tax, or similar tax, excise, or charge imposed by law shall, to the extent authorized or permitted by law, be reflected in the selling price and noted on all price lists. The Factor shall be responsible for, shall pay, and hereby indemnifies the Manufacturer against, all sales taxes, manufacturers' occupational taxes, and all other similar taxes, excises, or charges which now or hereafter may be levied,

imposed, or charged (whether Federal, state, municipal, or other governmental authority) in respect of the sale, storage, or handling of Manufacturer's hardboard products by the Factor, and the Factor shall be responsible for and make all reports required by public authorities in respect of such sales, storage, or handling.

Factor's Commissions; Remittances of Amounts Due Manufacturer; Option to Require Advances; Annual Settlement

SECTION 7. The Factor's compensation shall consist of (a) a current commission as hereinafter provided on each sale of the Manufacturer's hardboard products made by the Factor in accordance with the terms of this Agreement, (b) a graduated additional commission as hereinafter provided based on the aggregate square feet of all of the Manufacturer's hardboard products sold by the Factor in accordance with the terms of this Agreement during each contract year, and (c) the excess of the price at which the Factor may make sales of hard board products over the carlot list price applicable to, and at the time of sale in effect with respect to, the hardboard products so sold, such excess being due to the price or prices applicable to sales in less than carlot quantities.

The computation of the Factor's current and graduated additional commissions, the method and terms of remittance by the Factor to the Manufacturer for all hard board products shipped by the Manufacturer on orders received from the Factor, and the method and terms of settlement of the Factor's commission on sales made by the Factor and any approved selling agent, shall be as follows:

(1) The current commission which the Factor shall be entitled to retain on account of sales made by the Factor or any approved selling agent of the respective hard board products of the Manufacturer shall be:

On 1/8" Untempered Presdwood, at the rate of 45% of the Manufacturer's current car lot list price to its dealers, the commission to be computed on the respective quantities included in each sale;

On 1/8" and 3/16" Temprtile and Quartrboard, at the rate of 40% of the Manufacturer's current car lot list price to its dealers for such respective products, the commission to be computed on the respective quantities included in each sale;

On 1/4" and 5/16" Untempered Presdwood, at the rate of 38% of the Manufacturer's current car lot list price to its dealers for such respective products, the commission to be computed on the respective quantities included in each sale;

On 3/16" Untempered Presdwood and DeLuxe Quartrboard, at the rate of 35% of the Manufacturers' current car lot list price

to its dealers for such respective products, the commission to be computed on the respective quantities included in each sale;

On 1/8" Tempered Presdwood, at the rate of 45% of the aforesaid price for 1/8" Untempered Presdwood plus 10% of the excess of the Manufacturer's current car lot list price to its dealers for such Tempered Presdwood over the aforesaid price of 1/8" Untempered Presdwood, the commission to be computed on the respective quantities included in each sale;

On 5/16" Tempered Presdwood, at the rate of 35% of the aforesaid price for 5/16" Untempered Presdwood plus 10% of the excess of the Manufacturer's current car lot list price to its dealers for such Tempered Presdwood over the aforesaid price of 5/16" Untempered Presdwood, the commission to be computed on the respective quantities included in each sale;

On 1/4" and 5/16" Tempered Presdwood, at the rate of 38% of the aforesaid prices for 1/4" and 5/16" Untempered Presdwood, respectively, plus 10% of the excess of the Manufacturer's current car lot list price to its dealers for 1/4" and 5/16" Tempered Presdwood over the aforesaid price for 1/4" and 5/16" Untempered Presdwood, respectively, the commission to be computed on the respective quantities included in each sale;

On black or other special colored Tempered Presdwood, in addition to the current commissions on uncolored Tempered Presdwood of like thickness as above set forth, at the rate of 10% of the excess of the Manufacturer's current car lot list price to its dealers for such black or other special colored Tempered Presdwood over the aforesaid current car lot list price to its dealers for uncolored Tempered Presdwood of like thickness, such excess to be computed on the respective quantities included in each sale;

On Special Concrete Form Board, at the rate of 35% of the Manufacturer's current car lot price to concrete form fabricators as shown by the Manufacturer's special separate fabricator's price list after first deducting from such price a special concrete form board processing charge equal to the difference between the Manufacturer's current car lot list price to its dealers for Untempered Presdwood and Tempered Presdwood of the same thickness as such Special Concrete Form Board, and in addition thereto 10% of the said differential in price between such Untempered and Tempered Presdwood, the commission to be computed on the respective quantities included in each sale.

However, if the aggregate footage of hard board products ordered from the Manufacturer during a six months' period ending at the close of any calendar month shall be less than one million five hundred thousand square feet, then beginning with orders received following the close of such calendar month and includ-

ing all orders received until the end of such subsequent calendar month as the Factor's orders for the six months' period ending with such subsequent calendar month shall have increased to not less than one million five hundred thousand square feet, wherever the above 45% rate of current commission would apply it shall be reduced to 35%, wherever the above 40% rate of current commission would apply it shall be reduced to 30%, wherever the above 38% rate of current commission would apply it shall be reduced to 28%, and wherever the above 35% rate of current commission would apply it shall be reduced to 25%; but the acceptance by the Manufacturer of remittances on such basis, as hereinafter required to be made by the Factor, shall not constitute a waiver of the Manufacturer's right of cancellation as provided in Section 16 hereof. For the purposes of this paragraph the words "ordered from the Manufacturer," "orders received" and "Factor's orders" means orders for immediate shipment actually received by the Manufacturer at its plant.

All commissions hereinabove provided for and all remittances hereinafter provided for shall be computed exclusive of any wrapping charge (except on Temprtile) and exclusive of all sales taxes, manufacturers' occupational taxes and other similar taxes, excises and charges on the sale of the various hard board products sold by the Factor or any approved selling agent and which are reflected in the selling price as provided in Section 6 hereof.

(2) Within twenty (20) days after the close of each calendar month, the Factor shall remit to the Manufacturer in Chicago exchange, a sum equal to the applicable Manufacturer's car lot list prices to its dealers on all hard board products of the Manufacturer (and as to Special Concrete Form Board the Manufacturer's car lot price to concrete form fabricators) which shall have been sold by the Factor and its approved selling agents during such calendar month less the current commissions due the Factor on account of such sales computed as provided in paragraph numbered "(1)" of this Section 7.

As an alternative to the method and terms of remittance above set forth, the Manufacturer shall have the option, to be exercised by it from time to time in its sole discretion, to require the Factor to advance to the Manufacturer in Chicago exchange, within twenty (20) days after the close of each calendar month in which hard board products shall have been shipped by the Manufacturer to the Factor or any approved selling agent, a sum equal to one-half (½) the difference between the applicable Manufacturer's car lot list prices to its dealers (and as to Special Concrete Form Board the Manufacturer's car lot price to concrete form fabricators) on the hard board products so shipped during such calendar month and the current commission to be due the Factor

thereon when sold, computed as provided in paragraph numbered "(1)" of this Section 7. Notice of the Manufacturer's election to require such advance shall be given by the Manufacturer to the Factor not later than five (5) days following the close of the calendar month to which such advance shall be applicable. When such notice has been so given such alternative method and terms of remittance shall thereafter continue to apply to each subsequent month until the Manufacturer shall give notice of discontinuance and its election to revert to the method and terms of remittance first above set forth. Whenever and as often as the Manufacturer shall adopt the foregoing alternative method of requiring advances, it shall also have the option, to be exercised by it at its sole discretion, to require the Factor to advance to the Manufacturer in Chicago exchange a sum equal to one-half (½) the difference between the applicable Manufacturer's car lot list prices to its dealers on hard board products shipped by the Manufacturer to the Factor or any approved selling agent prior to such aforesaid calendar month and then on hand and unsold and the current commission to be due the Factor thereon when sold computed as provided in paragraph numbered "(1)" of this Section 7. In each case the balance (being the difference between the Manufacturer's car-lot list prices to its dealers in effect at the time of the sale and the Factor's current commission thereon, less the aforesaid advance) shall be remitted by the Factor to the Manufacturer in Chicago exchange within twenty (20) days after the close of the calendar month in which said hard board products shall have been sold by the Factor or such selling agent.

Notwithstanding the foregoing provisions of this paragraph (2), in the event the Factor shall direct the Manufacturer to ship any of its hard-board products direct to a customer or customers of the Factor, then the Factor, within twenty (20) days from the close of the calendar month in which said hard-board products were so shipped, shall account for and remit to the Manufacturer the entire difference between the applicable Manufacturer's carlot list prices to its dealers (and as to Special Concrete Form Board the Manufacturer's carlot price to concrete form fabricators) and the current commission due the Factor thereon computed as provided in paragraph numbered "(1)" of this Section 7.

(3) In addition to the above, the Factor shall remit to the Manufacturer 90 percent of all applicable wrapping charges on hard-board products (except on Temprtile) wrapped by the Manufacturer, whether such wrapping charges be separately quoted on the Manufacturer's current dealers' price list or whether as to such territorial area or areas as the Manufacturer may determine, such wrapping charges are included in the quoted prices of hard-board products in the Manufacturer's current dealers' price list applicable to such area or areas. On hard-board products wrapped by

the Factor, the Factor shall be entitled to retain the entire wrapping charge.

(4) Said remittances to be made on account of sales as above provided for, together with wrapping charges applicable to the hard-board products so sold, shall be due to the Manufacturer and shall be made during each month on or before the expiration of said twenty- (20) day period whether or not the Factor shall have collected the selling price for the hard-board products so sold.

(5) The computation to be made for the purpose of complying with clause "(b)" of the first sentence of this Section 7 shall be in accordance with the graduated percentages shown for the respective footage brackets set forth in the following schedule, the applicable bracket to be determined by the aggregate square feet of all of the Manufacturer's hard-board products sold by the Factor pursuant to this Agreement during each contract year, to-wit:

	First bracket	Second bracket	Third bracket	Fourth bracket	Fifth bracket	Sixth bracket
	Up to five million sq. ft.	Over five million sq. ft. and up to ten million sq. ft.	Over ten million sq. ft. and up to fifteen million sq.	Over fifteen million sq. ft. and up to twenty million sq. ft.	Over twenty million sq. ft. and up to twenty-five million sq. ft.	Over twenty-five million sq. ft.
¼" Presdwood Quartrboard, ⅛" Temprtlle,	45%	47%	48%	49%	50%	52%
5/16" Temprtlie ¼" Presdwood, 5/16" Presdwood	40%	42%	43%	44%	45%	47%
5/16" Presdwood, DeLuxe Quartrboard, Special Concrete Form Board	38%	40%	41%	42%	43%	45%
	35%	37%	38%	39%	40%	42%

As soon as practicable but not more than sixty (60) days after the close of each contract year, provided that all sales for which accounting is to be made by the Factor hereunder for such contract year have been duly reported to the Manufacturer and accounted by the Factor, the Manufacturer will pay to the Factor a graduated additional commission determined as follows:

1st. The total number of square feet, surface measurement, of all hard-board products so sold by the Factor during such contract year shall be computed and the applicable footage bracket for such year thereby determined;

2nd. The commissions which would be payable on account of the respective hard-board products so sold at the respective percentage rates above set forth under such applicable footage bracket, computed on the respective car-lot list prices to dealers and/or on the special separate fabricators' price list as to Special Concrete Form Board (excluding all wrapping, tempering, processing, and other special charges which carry a flat commission only) in effect at

the respective dates of sale of said products, shall then be determined;

3rd. The difference between the amount so determined under the foregoing clause "2nd" and the amount of the current commissions on the sale of said products retained by the Factor, as provided in paragraph numbered "(1)" of this Section 7, shall constitute the graduated commission to be paid by the Manufacturer to the Factor.

In all cases involving the accounting for sales of "longs" and "shorts" as required by Section 9 hereof, the phrases "respective quantities," "sold," and "each sale" shall, for the purpose of determining the applicable footage bracket, commissions due the Factor and the remittances due the Manufacturer, be construed on the basis of the accounting and remittances required by Section 9.

Standard Sized Boards; Additional Standard Sizes

SECTION 8. The Manufacturer shall not be obligated to manufacture or ship its various hard board products to be sold by the Factor hereunder, (a) if to Factor's customers, in a trimmed size larger than the standard size of 12′ in length by 4′ in width (with allowance for Manufacturer's current specification tolerance over or under) or (b) if to Factor itself, in a trimmed size larger than the standard size of 12′ in length (plus saw kerf allowance of ½″ if so ordered) by 4′ in width (with allowance for Manufacturer's current specification tolerance over or under) or (c) as to both Factor's customers and the Factor itself, in thickness greater than the standard thickness for its respective hard board products as set forth in "Schedule II" annexed hereto. On orders for shipment to the Factor only, the Factor may specify untrimmed boards, in which event Manufacturer will ship untrimmed standard sized boards which, for standard sized 4′ x 12′ boards, will be approximately from 12′1″ to 12′3″ in length by approximately 4′1″ to 4′2″ in width, it being understood that such hard boards will be shipped by Manufacturer without any cut and only as they come from Manufacturer's machines. In determining commissions due the Factor and remittances due the Manufacturer, all standard sized boards, whether furnished trimmed or untrimmed or with or without saw kerf allowance, shall be accounted for and settlement made on the basis of standard sized boards. However, if and during such time as the Manufacturer shall manufacture as a standard sized product and offer for sale, or sell, to the classes of trade to which the Factor is authorized herein to sell, any of its various hard board products listed on said "Schedule II" in sizes of different

length, width or thickness than as shown on said Schedule, then the Manufacturer shall be obligated to make such hard board products in such different standard size or sizes available for sale by the Factor at such minimum selling prices, maximum terms of sale and conditions of sale as shall, from time to time, be designated and fixed by the Manufacturer (which shall be the same as those at which the Manufacturer is at the time offering to sell or selling said hard board products in such different standard size or sizes to the classes of trade to which the Factor is permitted to sell), and with commissions fairly comparable to the commissions for hard board products as provided for in Section 7 hereof.

Cutting of Certain Standard Sized Boards Into "Longs" and "Shorts"; Classes of Trade to Which Factor May Sell

SECTION 9. The Manufacturer agrees that, if requested by the Factor so to do at the time the Factor places an order for hard boards, it will cut its standard sized hard boards listed on said "Schedule II" (except Presdwood of ¼" or more in thickness, whether tempered or untempered or colored or uncolored, and except Temprtile and Special Concrete Form Board) into not more than two pieces, provided that one of the two resultant pieces shall constitute a "long" as herein defined, or will if so ordered cut any such standard sized board (except Special Concrete Form Board) into two "longs" of equal length. When the resultant "longs" are shipped by the Manufacturer, and/or when they are sold by the Factor, the Factor shall account for and remit to the Manufacturer as if the shipment and/or sale were a shipment and/or sale of the entire standard sized hard boards from which said "longs" were cut, whether or not the resultant "shorts" as herein defined, are shipped to the Factor or on its order to the Factor's customers. However, if such cutting would result in two "longs" such cutting will be done only on the condition that the Factor orders both resultant pieces shipped at the same time. In such event, whenever either of the resulting "longs" (whichever shall be sold first) shall be sold by the Factor it shall account for and make remittance to the Manufacturer as if the sale were a sale of the entire standard sized hard board from which the "long" so sold was cut, and, if advances shall have been required to be made by the Factor to the Manufacturer on products shipped to the Factor and unsold by it, such advances shall be made on the basis of shipment of the entire standard sized board from which said "longs" were cut.

Such resultant "shorts" may be sold to any of the classes of trade to which the Factor is permitted to sell standard sized boards and "longs," but only at such minimum selling prices,

maximum terms of sale and conditions of sale as shall, from time to time, be designated and fixed by the Manufacturer. The Factor may also sell such resultant "shorts" to classes of trade other than those classes to which it is permitted to sell standard sized boards and "longs," and such sales of "shorts" to such other other classes of trade may be made at prices to be determined by the Factor, and the Factor shall be under no obligation to account for the price or prices received. The Factor shall not be entitled to order "shorts" except to the extent that "shorts" are the resultant of an order for "longs." On all orders placed for hard boards to be shipped to the Factor's plant or warehouse and calling for cutting into "longs" and "shorts," the Factor shall order all such resultant "shorts" shipped at the same time as the "longs" are shipped. On all orders placed for hard boards to be shipped to any other destination than Factor's plant or warehouse and calling for the cutting into "longs" and "shorts," but not specifying shipment of all resultant "shorts," the Manufacturer will hold at its factory the resultant "shorts" for which shipment is not so specified, provided that whenever resultant "shorts" shall have accumulated in excess of a car lot and the Manufacturer shall notify the Factor in writing to that effect, then within ten (10) days from the giving of such notice the Factor shall give shipping instructions for the excess so accumulated, and, failing so to do, the Manufacturer shall have the right to include such excess in any succeeding shipments of hard board products to Factor's plant or warehouse, provided that with respect thereto the car lot freight rate shall apply.

The Factor may, on its own account, cut standard sized hard boards which it may have on hand (except Presdwood of 1/4" or more in thickness, whether Tempered or Untempered or colored or uncolored, and except Temprtile and Special Concrete Form Board) into two pieces, provided that one of such pieces shall constitute a "long" as herein defined, or may cut any standard sized board (except Special Concrete Form Board) into two "longs" of equal length. When such resultant "longs" are sold by the Factor it shall account for and remit to the Manufacturer as if the sale were a sale of the entire standard sized board from which said "longs" were cut. If such cutting by the Factor would result in two "longs," then whenever either of the resulting "longs" (whichever shall be sold first) shall be sold by the Factor, it shall account for and remit to the Manufacturer as if the sale were a sale of the entire standard sized hard board from which the "long" so sold was cut.

The pieces resulting from the Factor's cutting as above permitted and constituting "shorts" as herein defined, if sold by the Factor to any of the classes of trade to which the Factor is per-

mitted to sell standard sized board and "longs," shall be sold only at such minimum selling prices, maximum terms of sale and conditions of sale as shall, from time to time, be designated and fixed by the Manufacturer and communicated to the Factor. The Factor may also sell such resultant "shorts" to classes of trade other than those classes to which it is permitted to sell standard sized boards and "longs," and such sales of such resultant "shorts" to such other classes of trade may be made at prices to be determined by the Factor, and the Factor shall be under no obligation to account for the price or prices received.

The Factor may re-cut any resultant "shorts" which it may have on hand but only for the purpose of sale to the classes of trade to which the Factor is permitted to sell standard sized boards and "longs" at such minimum selling prices, maximum terms of sale and conditions of sale as shall, from time to time, be designated and fixed by the Manufacturer. Factor agrees that it will make no sale of re-cut "shorts" to any other classes of trade.

The Factor may make sales of said standard sized hard-board products (except Special Concrete Form Board) and "longs" to the following classes of trade but no others, to wit:

(a) Dealers, as herein defined;

(b) Such departments and agencies of the United States Government as may be designated from time to time by the Manufacturer, which departments and agencies will be those, but only those, to which the Manufacturer is currently selling or offering to sell its hard-board products;

(c) Wholesalers and jobbers, as herein defined; and

(d) Reserves, as herein defined.

Unless otherwise specially authorized by terms and provisions appearing in the Manufacturer's current price list to its dealers, and then only to the extent and on the terms and conditions so authorized, Special Concrete Form Board, if and when available for sale by the Factor, may be sold only to concrete form fabricators as herein defined, and only in not less than car lot quantities.

Sales and Inventory Reports by Factor

SECTION 10. The Factor agrees to report to the Manufacturer, on or before the 20th day of each calendar month during which this Agreement shall be in force and effect, on and pursuant to forms to be furnished by the Manufacturer, its sales for the preceding calendar month and its inventory of all hard-board products on hand at the end of such preceding calendar month, such report and inventory to be in such reasonable detail as may be requested by the Manufacturer, but no such report shall require

the disclosure of the names or addresses of Factor's customers except as to sales of Special Concrete Form Board with respect to which the conditions of sale imposed by the Manufacturer must be complied with. The Factor shall report and account for as though sold, all hard-board products shipped to the Factor or its selling agents and which shall have been damaged while in the possession of the Factor or its selling agents.

Trade-Marks on Boards; Reservation of Patent Notice

SECTION 14. If the Factor desires, the Manufacturer will, without extra cost except the actual cost to the Manufacturer of making the necessary dies and branding irons, brand or mark all hard boards with the Factor's name or trade-mark or trade name or with such other indicia as may be requested and deemed by the Manufacturer to be reasonable. The Factor expressly agrees that it will not use or infringe, that it will not permit any approved selling agent to use or infringe, and that it will not knowingly permit any of its reserves, wholesalers, jobbers or dealers to use or infringe the trade-mark "Masonite," or any of the trade names or trade-marks of the Manufacturer, including the trade-marks "Presdwood, "Quartrboard," Temprtile" and "Tempered Presdwood." In the event that any of the Factor's reserves, wholesalers, jobbers or dealers, without authorization of the Manufacturer, shall use or infringe any trade name or trade-mark of the Manufacturer, including those specifically mentioned above, the Factor, upon notification by the Manufacturer, agrees not to make any further sales of hard-board products to such reserve, wholesaler, jobber or dealer until such reserve, wholesaler, jobber or dealer shall have ceased the unlawful use of said trade names or trade-marks. However, nothing herein shall prevent the Factor's designation of the Manufacturer's tempered hard-board products by the use of the word "tempered."

The Manufacturer expressly reserves the right to mark all hard-board products sold by the Factor with such patent notice as it may be advised by counsel if necessary for its protection, but no such marking shall in any manner deface the said hard-board products nor in any manner differ from the method used by the Manufacturer in so marking said hard-board products sold directly by the Manufacturer to its own customers.

Accountant's Examination of Factor's Records and Accounts

SECTION 12. The Manufacturer shall have the right, from time to time, and at any reasonable time or times, through such firm of accountants and auditors of recognized standing as it may select, to inspect and examine the physical inventory of hard-board

products in possession or under control of the Factor and the books, records, and accounts of the Factor relating to any of the transactions or matters which are the subject of this Agreement. The Factor agrees to keep complete and accurate records and books of account of all transactions coming within the purview of this Agreement. Such accountants and auditors shall not divulge to the Manufacturer any confidential or commercial information with respect to the Factor's business, provided, that if such accountants and auditors find any violation or violations of this Agreement, then they shall be entitled to report all such information, derived from such sources as they may deem necessary and proper in order to fully advise the Manufacturer of all facts pertinent thereto.

Standard and Quality Products

SECTION 13. The Manufacturer agrees that all hard board products which may be manufactured and shipped by it on orders of the Factor shall be good, workmanlike products of a character and quality equal to that currently manufactured by it for sale to its own direct customers. However, the Manufacturer's liability for noncompliance with this covenant shall be expressly limited to replacing, delivered to the Factor or its customers, according to the location of the product to be replaced, and without cost to the Factor or its customer, any defective hard board products when the defect is one of manufacture.

Manufacturer's Minimum Selling Prices Not to be Reduced by the Use of Combined Bids or Other Unfair Methods of Competition

SECTION 14. The Manufacturer's respective minimum selling prices as set forth on its current published dealers' price lists and as may be from time to time hereafter changed and designated by the Manufacturer are prices graduated both as to the class of trade to which the Factor is permitted to sell and as to quantities included in each sale made by the Factor. To the end that such prices shall at all times be observed and shall not, either directly or indirectly, be reduced, the Factor expressly agrees:

(a) That it will not submit any bid or quotation or make any sale, either directly or indirectly, below the current minimum selling prices or on more favorable terms of sale and conditions of sale for the particular hard board products covered by said bid, quotation or sale in effect for the particular class of trade in which such purchaser or prospective purchaser is properly classified; and

(b) That it will not submit any bid or quotation or make any sale, either directly or indirectly, below the current minimum

selling price or on more favorable terms of sale and conditions of sale for the particular hard board products included in the specific quantity covered by said bid, quotation or sale in effect for such quantity bracket; and

(c) That if it shall publish a price list containing prices on other products (whether or not of its own manufacture) and on the Manufacturer's hard board products, or submit a bid or quotation for, or make a sale of other products together with the Manufacturer's hard board products, the prices for the Manufacturer's hard board products shall in every instance be set forth entirely separate from and independent of the prices on such other products included in such price list, bid, quotation or sales invoice; and

(d) That each such price list, bid, quotation and offer of sale shall be made in such form and manner that the purchase of products other than the Manufacturer's hard board products shall not be dependent upon or in any manner conditioned upon the purchase of the Manufacturer's hard board products included therein or vice versa; and

(e) That it will not, either directly or indirectly, through discounts, rebates, quantity prices or any other special concession or allowances of any character whatsoever in respect of other merchandise which it may sell or offer to sell, reduce the current minimum selling prices in effect on Manufacturer's hard board products, either as to class of trade or as to quantity bracket; and

(f) That it is the intent hereof that any quantity prices to dealers and any quantity prices or trade discounts to wholesalers and jobbers shall apply only where purchases are made by a dealer, a wholesaler or a jobber, as the case may be, for his own account, and that it will not knowingly permit or allow any quantity or trade discount where it has information that a purchase is being made by a dealer or wholesaler or jobber for the collective account of others. However, this subparagraph shall not be construed to apply to a sale to a bona fide reserve, as herein defined.

The foregoing subparagraphs (d) and (e) shall not be construed to extend to a quantity price, bid, or quotation in those instances where the quantity on which such price, bid, or quotation is based is made up in part of fibre boards manufactured primarily for the purpose of insulation and regularly sold by the Factor primarily for the purpose of insulation and in part of hard board products, it being the intent hereof that such price, bid or quotation may be at the regular established prices of each such product applicable to the aggregate quantity of such prod-

ucts and to the class of trade to which such price, bid, or quotation is submitted.

Sales at Less than Minimum Selling Price; Violation of other Covenants; Unintentional Violations

SECTION 15. In the event the Factor shall make any sale of any of the Manufacturer's hard board products at a price less than the then current minimum selling price designated by the Manufacturer for the hard board products so sold, or on terms of sale or conditions of sale more favorable to the purchaser than those currently in effect (except with respect to the sale of "shorts" as otherwise permitted by Section 9 thereof), or to an unauthorized purchaser, or in violation of any other covenant herein contained, it shall account to the Manufacturer for the amount due the Manufacturer for such hard board products as provided in Section 7 hereof, and in addition thereto shall pay the Manufacturer as and for liquidated damages the amount of $10.00 per thousand square feet of all hard board products involved in such sale. However, the payment of such damages in respect of any such sale shall not deprive the Manufacturer of its right to cancel this Agreement by reason of such breach.

If the Factor shall unintentionally violate the foregoing provisions of this Section 15 by bona fide error of calculation or other bona fide error or mistake, then the Factor shall not be liable for the liquidated damages above set forth but shall account to the Manufacturer for the difference between the price at which said hard board products were actually sold and the correct then current minimum selling price applicable to the quantity sold and to the class of trade to whom sold, together with interest on such difference at the rate of 6% per annum from the date on which the correct price should have been accounted for to the date on which it shall be actually accounted for, and the Manufacturer shall have no right to cancel this Agreement on account of such unintentional violation. If the Manufacturer does not agree that such violation was unintentional, the Factor shall have the right to have the question referred to arbitration as provided in Section 18 hereof, and the burden shall be on the Factor to prove that such violation was unintentional.

SECTION 16. The Factor shall have the absolute right to cancel and terminate this Agreement at any time upon giving to the Manufacturer not less than one hundred eighty days prior written notice of its election so to do, and the Manufacturer shall likewise have the absolute right to cancel and terminate this Agreement at any time upon giving to the Factor not less than one hundred eighty days' prior written notice of its election so to do.

Either the Manufacturer or the Factor may also cancel and terminate this Agreement forthwith by giving written notice of cancellation to the other party hereto in event such other party shall become insolvent or be adjudicated a bankrupt, or in event such other party shall make an assignment for the benefit of its creditors, or in event a receiver of such other party or of substantially all of its assets and properties shall be appointed by a court of competent jurisdiction, or in event a petition for the reorganization of such other party under Section 77B of the Bankruptcy Act shall be filed and approved.

Provisions for Cancellation

The Manufacturer shall also have the absolute right to cancel and terminate this Agreement at any time forthwith by written notice to the Factor in event the Factor shall fail to have ordered from the Manufacturer at least one million five hundred thousand square feet of the Manufacturer's hard board products for any six months' period. For this purpose the phrase "ordered from the Manufacturer" means orders for immediate shipment actually received by the Manufacturer at its plant during such six months' period.

The Manufacturer shall also have the absolute right to cancel and terminate this Agreement at any time forthwith by written notice to the Factor in event the Factor shall cut standard sized hard boards otherwise than as expressly permitted by the provisions of Section 9 hereof or shall recut any resultant "shorts" and make sales of any such recut stock otherwise than as expressly permitted by the provisions of said Section 9 hereof.

The Manufacturer shall also have the absolute right to cancel and terminate this Agreement at any time forthwith by written notice to the Factor in event that the Factor, at any time while this Agreement is in force and effect, shall engage in the business of selling or distributing anywhere in the continental United States any other product, whether of its own manufacture or manufactured by others, which by reason of its physical characteristics and selling price constitutes a commercially competing product with, or substitute for, the Manufacturer's hard board products. The right to determine whether any such product comes within the foregoing inhibition is vested solely in the Manufacturer, but such right will not be exercised arbitrarily.

In the event that either the Factor or the Manufacturer shall fail or refuse to keep or perform any of the other terms, conditions, or agreements to be kept and performed by each of them, respectively, as in this Agreement provided, then the party aggrieved shall have, at its option, the right to cancel this Agreement in the manner

following, to wit: The party so aggrieved shall give written notice to the other party of its intent to cancel this Agreement on a date fixed in said notice, which date shall be not less than thirty (30) days from the date the notice is mailed to the other party, and said notice shall also specify the default or defaults for which the Agreement is to be cancelled. The other party shall then have the opportunity to cure and make good the default or defaults so specified, and if each and every default so specified shall have been cured and made good prior to the date fixed in said notice, then said notice shall be deemed to have been withdrawn. If, however, the party in default shall fail to cure the specified defaults prior to the date specified in said notice, then said cancellation shall become effective and absolute on the date so fixed. However, nothing in this paragraph contained shall abridge the right of either party to arbitrate the issues involved in any claim of default or failure to cure the same.

In event of the cancellation of this Agreement as herein provided for, neither party shall be under any further obligation or liability hereunder, except to account for transactions occurring prior to such cancellation. Particularly, but without limiting the generality of the foregoing, the Factor shall have no claim against the Manufacturer for any amount which might otherwise become due the Factor under the graduated percentages applicable to the aggregate footage for a contract year under the Schedule set forth in Section 7 hereof, and settlement for all compensation due the Factor shall be made on the basis of the aggregate square feet of all hard board products sold during such portion of the contract year as shall have expired up to the effective date of such cancellation. In event of such cancellation, the Factor will as of the effective date thereof promptly account for all hard board products which may have been sold by it and any approved selling agents and which have not been accounted for. As to hard board products previously shipped to the Factor or any approved selling agent of the Factor and remaining unsold, it will sell the same at the then current minimum selling prices in effect, and duly account for such sales. However, at the option of the Manufacturer, it will return to the Manufacturer all or such portion of undamaged standard sized hard boards and "longs" (together with an amount of "shorts," which may be diversified between 2′ x 4′, 3′ x 4′, and 4′ x 4′ sizes, corresponding with the aggregate footage cut from such "longs") as the Manufacturer shall request, and shall account for and pay over to the Manufacturer, in respect of such other hard board products as the Factor or its selling agents may have on hand, as though such hard board products were sold. As to all hard board products so returned, the Manufacturer will refund to the Factor any advances which may have been made by the Factor

to the Manufacturer on account thereof. The Manufacturer will also pay to the Factor reasonable cartage or handling charges incurred in making delivery of such hard board products f. o. b. cars at Factor's plant or warehouse.

Defense Against Alleged Patent Infringement

Section 17. The Manufacturer hereby warrants that none of the hard board products covered by this Agreement, when used for the general purposes for which such hard board products are customarily designed or intended, will infringe any United States Letters Patent not owned or controlled, either directly or indirectly, by one of the parties hereto, and agrees to save harmless and protect the Factor, as well as the Factor's customers, against any claim or demand based on an alleged infringement of any such other United States Letters Patent. Upon notice in writing given by the Factor to the Manufacturer, the Manufacturer agrees to appear and defend, at its own expense, any and all suits at law or in equity arising from such alleged infringement, provided always that the Manufacturer shall have full control of the defense of any such suit.

If it be finally adjudicated that any of the hard board products covered by this Agreement, or the manufacture thereof, infringe upon any claim of valid United States Letters Patent not owned or controlled, either directly or indirectly, by one of the parties hereto, so as to impair the commercial production thereof by the Manufacturer, then this Agreement insofar as it applies to such hard board products shall be deemed cancelled or suspended.

Section 18. All controversies between the parties hereto as to the construction of any of the terms of this Agreement or the performance thereof by the parties shall be settled and finally determined in the City of Chicago, Illinois, by arbitration in the following manner:

Arbitration

The party desiring to submit any such difference or controversy to arbitration shall give written notice to the other party setting forth the point or matter to be arbitrated and designating its arbitrator, who shall be a person having no interest in the business of the party so appointing him. The party hereto so notified, within fourteen (14) days after the delivery of such notice, shall by written notice to the other party designate its arbitrator, who shall be a person having no interest in the business of the party so appointing him. If the party hereto first notified as aforesaid shall fail within said fourteen (14) day period to appoint its arbitrator, then the arbitrator appointed by the other party hereto shall act for both parties and his decision in writing when signed and filed

with each of the parties hereto shall be final and binding upon both parties hereto as if he had been appointed as sole arbitrator by mutual agreement, and each party shall conform to and abide by said decision.

If two arbitrators are appointed as aforesaid and they shall agree on their decision within thirty (30) days after the delivery of the aforesaid notice appointing the second arbitrator, they shall make their decision in writing and such decision when signed and filed with each of the parties hereto shall be final and binding upon both parties hereto and each party shall conform to and abide by said decision. If two arbitrators are appointed as aforesaid and they shall fail to agree within thirty (30) days after the delivery of the aforesaid notice appointing the second arbitrator, they shall select a third arbitrator. In such event, the decision in writing of the three arbitrators, or of any two of them, when signed and filed with each of the parties hereto shall be final and binding on both parties hereto and each party hereto shall conform to and abide by said decision.

If two arbitrators are appointed as aforesaid and they shall fail to agree within the thirty (30) day period above provided for and they shall also fail for a further thirty (30) day period to appoint a third arbitrator, then upon not less than five (5) days' written notice given by either arbitrator to the other, application may be made to the senior acting judge of the United States District Court for the Northern District of Illinois for appointment by said judge of such third arbitrator, and the appointment made by said judge shall be binding upon the two arbitrators, the Manufacturer, and the Factor.

This provision for arbitration shall be the sole basis under which arbitrators appointed pursuant thereto shall act, and no arbitration statute of the State of Illinois or of any other state shall be applicable to the procedure of the arbitrators or to the enforcement of any decision made by them, but each of the parties agree that such decision shall be fully as binding with respect to the particular matter or matters in controversy as if it were a decree or order of Court of competent jurisdiction in the premises. The decision of the arbitrators shall determine by whom and in what manner the costs and expenses of the arbitration shall be paid.

Reservation of Right to Sell to Motion Picture Industry

SECTION 19. Anything herein contained to the contrary notwithstanding, the Manufacturer reserves complete jurisdiction and control of all sales of its hard board products to all motion picture producers located in Los Angeles County, California, and nothing herein contained shall be construed to permit or au-

thorize the Factor to make sales of hard board products to any motion picture producer located in said county and state, either directly or indirectly, and the price or prices fixed by the Manufacturer for sales to any such motion picture producer and sales made by the Manufacturer to any such motion picture producer shall be deemed to be selling prices and sales to a class of customers in which the Factor has no interest. Such selling prices and sales shall not be within the provision of Section 5 hereof, and neither "Schedule II" annexed hereto nor any subsequent price lists designating and fixing selling prices shall be deemed to have any reference to, or any bearing upon, prices and sales made to such motion picture producers.

Manner of Giving Notice

SECTION 20. Except as otherwise herein provided with respect to telegraphic notices, any notice or communication provided herein to be given or sent to the Manufacturer shall be deemed to have been duly given or sent if made in writing and mailed by registered mail, postage prepaid, addressed to Masonite Corporation, 111 West Washington Street, Chicago, Illinois, or at such different address as the Manufacturer may hereafter in writing request. Any notice or communication provided herein to be given or sent to the Factor shall be deemed to have been duly given or sent if made in writing and mailed by registered mail, postage prepaid, addressed to The Flintkote Company, 50 W. 50 St., New York, N. Y., or at such different address as the Factor may hereafter in writing request. Any such notice so mailed and so addressed shall be deemed to have been duly delivered on the first business day following the actual mailing thereof.

Definition of Terms

SECTION 21. For all purposes of this Agreement and of the price lists to be made and published by the Manufacturer from time to time, unless the context shall otherwise require:

(a) The term "person" means any individual, copartnership, corporation or other business entity and trustee or receiver who shall conduct the business of any of them;

(b) The phrase "continental United States" means the territory comprised in the forty-eight states of the United States of America, the District of Columbia and the territory of Alaska;

(c) The term "hard board products" means and is limited to the Manufacturer's products listed on "Schedule II" annexed hereto; provided that if (1) the Manufacturer shall produce additional standard sized products which are covered by, or manufactured under or pursuant to some one or more of the processes

described in some one or more of the patents listed in "Schedule I" annexed hereto and (2) the Manufacturer at its sole discretion shall elect to add any such product or products to the products listed on said "Schedule II," then during such time as such additional product or products shall be manufactured and so' . by the Manufacturer to the classes of trade to which the Factor is permitted to sell, such additional product or products shall be included in the term "hard board products";

(d) The phrase "terms of sale" means discounts, the extent and terms of credit to be allowed, if any, and any other matters having to do with discounts, time of payment and the terms of credit on which the Factor may make sales of hard board products;

(e) The phrase "conditions of sale" means any regulation or restriction, other than prices and terms of sale, which may be imposed by the Manufacturer in connection with the sale or delivery of hard board products, and which it also imposes and observes in connection with its own sales to the classes of trade to which the F. or is permitted to sell;

(f) The terms "standard size" and "standard sized," as applied to the Manufacturer's various hard board products to be sold by the Factor, means a hard board twelve feet in length by four feet in width (with allowance for Manufacturer's current specification tolerance over or under) and of one of the thicknesses in which such respective hard boards are manufactured as shown on "Schedule II" annexed hereto and by reference made a part hereof; provided that if the Manufacturer shall regularly manufacture said hard boards for sale to the classes of trade to which the Factor is authorized herein to sell, in sizes of different length, width or thickness than as shown on said "Schedule II," then such different size or sizes shall be deemed to be included within the meaning of "standard size" or "standard sized" as herein used; it being understood that the above phrase "shall regularly manufacture * * * in sizes of different length" etc. means the original production of a hard board and, except for original edge trimming to size, does not include any subsequent treatment or additional processing or cutting;

(g) The term "long" means a hard board, (a) of one of the following lengths, to wit, five feet, seven feet, eight feet, nine feet, or ten feet, and which results solely from the cutting into two pieces of a standard sized hard board (except Presdwood of 1/4" or more in thickness both Tempered and Untempered and whether colored or uncolored, and except Temprtile and Special Concrete Form Board, unless cut by the Manufacturer for the classes of trade to which the Factor is permitted to sell), and (b) of the length of six feet resulting from the cutting into two pieces of

a standard sized hard board (except Special Concrete Form Board), when so cut by the Manufacturer at the special request of the Factor or when so cut by the Factor from such standard sized hard board which it has on hand;

(h) The term "short" means a hard board less than five feet in length, which results solely from the cutting into two pieces of a standard sized hard board (except Presdwood of ¼" or more in thickness, both Tempered and Untempered and whether colored or uncolored, and except Temprtile and Special Concrete Form Board) when such cutting is done by the Manufacturer pursuant to a special request of the Factor for "longs" or when "longs" are cut by the Factor from such standard sized hard boards which it has on hand;

(i) The term "car lot" means a quantity of hard board products which shall be not less than the minimum number of square feet, surface measurement, set forth on the Manufacturer's current price list as constituting a car-lot quantity;

(j) The term "L. C. L. lots" means a quantity of hard board products less than a car lot as above defined, but which may in turn consist of such different sub-classifications of minimum and maximum square feet, surface measurement, as may be set forth from time to time on the Manufacturer's current price list;

(k) The term "square feet," when used for the purpose of determining the Factor's commissions on sales and on aggregate footage sold during each year, or for the purpose of determining the aggregate footage ordered from or shipped by the Manufacturer, or sold during any given period of time, means the surface measurements of the standard sized hard board products required to be used or shipped in the filling of such orders or shipments and determined by multiplying the length in feet by the width in feet, such measurement to be computed without reference to thickness;

(l) The phrase "for any six months' period" means any six consecutive calendar months during the time this Agreement shall be in force and effect, so that the first six months' period, for the purpose of determining whether the aggregate footage ordered from the Manufacturer is more or less than one million five hundred thousand square feet, shall begin on the first day of the first calendar month after the date of this Agreement and end on the last day of the sixth calendar month thereafter, and the second six months' period shall begin on the first day of the second calendar month after the date of this Agreement and end on the last day of the seventh calendar month after the date of this Agreement, and so on during the entire time this Agreement shall be in force and effect:

(m) A "dealer" means and shall be any person to whom the

Manufacturer would, from time to time, sell its hard board products at its current dealers' prices, terms and conditions and who, unless subsequent modifications of the following requirements are made by the Manufacturer, shall be limited to a person who shall continuously maintain, for the sale of insulation products and building materials, a plant or plants adequately equipped for service to the public with office, storage yards or warehous kept open regularly during business hours and who maintains a sales service and a sufficient stock of general insulation products and other building materials to supply his share of the normal retail requirements of the community where such facilities are located;

(n) A "wholesaler" and a "jobber" shall be construed as synonymous terms and means and shall be any person to whom the Manufacturer would, from time to time, sell its hard board products at its current dealers' prices, terms and conditions less a functional service compensation, and who, unless subsequent modification of the following requirements are made by the Manufacturer, shall be limited to a person (1) who is regularly engaged in the wholesale distribution of insulation products and building materials, (2) who normally purchases such materials in carload lots and makes such purchases for his own account, (3) who continuously maintains adequate warehouse and storage facilities, (4) who normally maintains on hand or has on order for immediate shipment at least one aggregate carload of insulation products and hard board products, (5) who invoices and assumes entire credit responsibility in connection with all of his sales and has sufficient financial resources so to do, and (6) who shall have first been accepted and classified, but only so long as such person shall remain so accepted and classified, by the Manufacturer as a wholesaler or jobber to whom the Factor may sell the Manufacturer's hard board products;

(o) A "selling agent" means and shall be limited to a subsidiary corporation of the Factor (1) which is regularly engaged in the sale or distribution of insulation products and building materials, and which has been granted the exclusive right to represent the Factor in the sale of the Manufacturer's hard board products in a designated territory, (2) to which the Manufacturer's hard board products will be shipped solely by the Factor, or by the Manufacturer on orders from the Factor, with title thereto remaining in the Manufacturer until sold by such selling agent pursuant to the terms hereof, (3) which shall have been appointed as such exclusive agent by written agreement between it and the Factor, which appointment shall have first been approved by the Manufacturer, and (4) which may act as such selling agent only so long as such appointment shall remain approved by the Manufacturer; it being further understood that, for the pur-

poses hereof, a "subsidiary corporation" means and shall be limited to a corporation of which fifty-one percent (51%) or more in aggregate amount of its issued and outstanding shares of capital stock having full voting rights, that is, shares entitled to vote at elections of directors (not including shares of preferred or preference stock, voting rights in respect of which may be exercised only in the event of certain defaults or like contingencies on the part of the issuing corporation), shall be at the time beneficially owned by the Factor;

(p) The term "reserve" means and shall be any person to whom the Manufacturer would, from time to time, sell its hard board products at its current dealers' prices, terms and conditions less a functional service compensation, and which, unless subsequent modification of the following requirements are made by the Manufacturer, shall be limited to a company incorporated under the laws of a state of the United States, with a capital structure the ownership of which is distributed among a group of dealers doing business within the continental United States only, and which company has for its purpose the purchase of building and insulation products for resale at wholesale only to its dealer members and other dealers doing business in the continental United States, and which shall have first been recognized and approved, but only as long as it shall remain so recognized and approved, by the Manufacturer as a reserve supply company;

(q) A "concrete form fabricator" means and shall be limited to a person who (1) fabricates and builds concrete forms to specifications, (2) purchases his form material for such fabrication in not less than car lots only, and (3) uses such concrete forms in construction work or sells or rents such concrete Forms to or for use by, a contractor engaged in construction work;

(r) The term "list price(s)" means the respective current prices fixed by the Manufacturer from time to time for each of its standard sized hard board products as shown in the Manufacturer's car lot price list to its dealers, such present list prices appearing on "Schedule II" annexed hereto; provided that wherever the phrase "list price to its dealers" or "current dealer's list price" or other like phrase would otherwise be applicable to Special Concrete Form Board, such phrase shall be taken and deemed to mean the Manufacturer's current price to concrete form fabricators as shown by special separate fabricator's price list, or by special fabricator's price separately shown on its dealers' price list;

(s) The term "minimum selling price(s)" as applied to dealers means the Manufacturer's current prices for its various hard board products in standard sizes, "longs" and "shorts" and in

various quantity bracket appearing in its dealers' price list as determined and published by the Manufacturer from time to time, and as applied to other classes of trade means the prices appearing on its current dealers' price list as aforesaid, less the maximum functional service compensation fixed by the Manufacturer from time to time for the respective classes of trade to which the Factor is permitted to sell; provided that said term as applied to Special Concrete Form Board means the Manufacturer's current car lot price to concrete form fabricators as determined by the Manufacturer from time to time and shown on its special-separate fabricator's price list, but as to sales made through dealers or through wholesalers and jobbers, if and when permitted, means less such maximum functional service compensation, if any, to dealers and to wholesalers and jobbers, respectively, as may be specially stated on Manufacturer's current dealers' price list, or Manufacturer's separate price list for wholesalers and jobbers, as the case may be.

The Manufacturer agrees that it will not, directly or indirectly, use the power of acceptance, approval, and classification, as set out in subparagraphs (n), (o), and (p) hereof, for the purpose or with the intent of diverting customers or business from the Factor to the Manufacturer or from the Factor to any other factor or agent of the Manufacturer, and further agrees that under its reserved right to determine who shall be classified as wholesaler, jobber, selling agent or reserve and of acceptance, approval or disapproval of appointments proposed to it by the Factor, such appointments will be acted upon with customary business diligence and without undue delay.

Right of Assignment

SECTION 22. Neither this Agreement nor any of the rights, interests, privileges, or obligations hereunder shall be assignable or transferable by the Factor without the express written consent of the Manufacturer first had and obtained. However, the Manufacturer will consent to the assignment hereof together with all rights and interests hereunder to such person, firm or corporation as shall acquire all or substantially all of the assets and going business of the Factor, provided such assignee shall in writing accept such assignment, assume all obligations of the Factor hereunder and agree to be bound by all the terms and provisions hereof.

Term of Agreement

SECTION 23. Except as herein otherwise provided, this Agreement shall continue in effect until the expiration of the term of that one of the United States Letters Patent listed on "Schedule I" annexed hereto having the longest unexpired term yet to run.

Law Governing Agreement

SECTION 24. This Agreement is executed and delivered at Chicago, Illinois, and the construction thereof shall be governed by the laws of the State of Illinois.

In witness whereof, said party of the first part has caused this Agreement to be signed in its corporate name by its President or a Vice President thereunto duly authorized and its corporate seal to be hereto affixed, attested by its Secretary or an Assistant Secretary, and the party of the second part has caused this Agreement to be signed in its corporate name by its President or a Vice President thereunto duly authorized and its corporate seal to be hereto affixed, attested by its Secretary or an Assistant Secretary, all in duplicate and all as of the date and year first above written.

MASONITE CORPORATION,
(Signed) By R. G. WALLACE,
Vice President,
Party of the First Part.

Attest:

(Signed) E. L. SABERSON,
Asst. Secretary.

THE FLINTKOTE COMPANY,
(Signed) By I. J. HARVEY, Jr.,
President,
Party of the Second Part.

Attest:

(Signed) F. H. NEHER, *Secretary.*

Schedule I—United States Patents

Patent No.	Date	Title and Subject Matter
1,383,370	7/5/21	Process of Splitting Mica. (Bancroft.)
1,485,894	3/4/24	Apparatus for Manufacturing Pulp Articles. (Sutherland.)
1,506,789	9/2/24	Apparatus for Drying Pulp Products. (Sutherland.)
1,548,135	8/4/25	Refining Engine. (Gamble.)
1,578,609	3/30/26	"Process and Apparatus for Disintegration of Wood and the Like." The original explosion patent.
1,655,618	1/10/28	"Apparatus for and Process of Explosion Fibration of Lignocellulose Material." Improvements on 1,578,609.

Patent No.	Date	Title and Subject Matter
1,663,504	3/20/28	"Press-Dried Structural Insulating Board and Process of Making same." Product such as "Quartrboard."
1,663,505	3/20/28	"Hard Grainless Fiber Products and Process of Making Same." Product such as "Presdwood."
1,767,539	6/24/30	"Process of Making Composition Boards and the Like and Apparatus Therefor." Process and apparatus for manufacture product such as "Presdwood."
1,784,993	12/16/30	"Water Resistant Fiber Product and Process of Manufacture." Incorporating size in the water bath, and sized product.
1,824,221	9/22/31	"Process and Apparatus for Disintegration of Fibrous Material." Improvements on original explosion patent 1,578,609.
1,844,861	2/9/32	"Process for the Manufacture of Vegetable Fiber Products." Improvements on 1,663,505, and use of chrome surface plates.
1,844,921	2/9/32	"Production of Hard Dense Bodies of Vegetable Fiber." Frosted surface pressing platen or member.
1,849,307	3/15/32	"Press Loader."
1,903,222	3/28/33	"Press." Movable screen in press.
1,923,105	8/22/33	"Process for Production of Non-Warping Fiber Boards." Humidifier process.
1,923,106	8/22/33	"Apparatus for Production of Non-Warping Fiber Boards." Division of 1,923,105, Humidifier Apparatus.
1,923,548	8/22/33	"Article Handling System." Also Division of 1,767,539.
1,923,549	8/22/33	"Article Handling System." Also division of 1,767,539.
1,924,162	8/29/33	"Cut-off Machine."
1,941,536	1/2/34	"Hard Vegetable Fiber Product High Strength and Process of Making Same." Tempering of "Presdwood" or the like.

Schedule II

1. List of standard sized hard board products being manufactured by the Manufacturer.

	Commercial thickness		Width		Length
Presdwood, Tempered and Untempered	1/8"	x	4'	x	12'
Presdwood, Tempered and Untempered	3/16"	x	4'	x	12'
Presdwood, Tempered and Untempered	1/4"	x	4'	x	12'
Presdwood, Tempered and Untempered	5/16"	x	4'	x	12'
Black Tempered Presdwood	1/8"	x	4'	x	12'
Black Tempered Presdwood	3/16"	x	4'	x	12'
Black Tempered Presdwood	1/4"	x	4'	x	12'
Black Tempered Presdwood	5/16"	x	4'	x	12'
Quartrboard	1/4"	x	4'	x	12'
DeLuxe Quartrboard	1/4"	x	4'	x	12'
Temprtile	1/8"	x	4'	x	12'
Temprtile	3/16"	x	4'	x	12'
Special Concrete Form Board	3/16"	x	4'	x	12'
Special Concrete Form Board	1/4"	x	4'	x	12'
Special Concrete Form Board	5/16"	x	4'	x	12'

NOTE.—Black Tempered Presdwood and Special Concrete Form Board, although being presently manufactured, are special products and will be available only when in stock, but when in stock will be available to Factor as well as Manufacturer, but only for sale by the Factor to the classes of trade to which the Factor is permitted to sell under the Agreement to which this Schedule is annexed.

2. List of standard sized hard board products which will be cut into "longs" and resultant "shorts" by the Manufacturer at the request of the Factor, and the respective lengths into which same will be cut.

1/8" and 3/16" Presdwood, Tempered and Untempered, Quartrboard and DeLuxe Quartrboard, all 4'x12', will be cut as follows;

Into "longs," 4'x8', 4'x9', and 4'x10'.

Into resultant "shorts," 2'x4', 3'x4', and 4'x4'.

The above mentioned 1/8" and 3/16" Presdwood, Tempered and Untempered, Quartrboard and DeLuxe Quartrboard, all 4'x12', will also be cut into 4'x5' "longs" and resultant 4'x7' "longs," subject to the special terms and conditions of the Agreement to which this Schedule is annexed.

Any standard sized hard board product (except Special Concrete Form Board) will on request be cut into 4'x6' lengths and two of such 4'x6' lengths will be treated as the equivalent of one 4'x12' standard sized board, both lengths being taken by the Factor when so requested to be cut.

3. Manufacturer's current minimum car lot quantities and current list prices to dealers on the basis of which, until changed by the Manufacturer, the del credere Factor's commissions will be computed as provided in Section 7 of the Agreement to which this Schedule is annexed.

	Minimum car lot quantity sq. ft.	Dealer's car lot list prices per M sq. ft.
Untempered Presdwood:		
1/8" x 4' x 12'	56,000	$42.00
5/32" x 4' x 12'	40,000	54.00
1/4" x 4' x 12'	28,000	75.00
9/16" x 4' x 12'	24,000	100.00
Tempered Presdwood:		
1/8" x 4' x 12'	56,000	52.00
5/32" x 4' x 12'	40,000	64.00
1/4" x 4' x 12'	28,000	85.00
9/16" x 4' x 12'	24,000	110.00
Black Tempered Presdwood:		
1/8" x 4' x 12'	56,000	62.00
5/32" x 4' x 12'	40,000	79.00
1/4" x 4' x 12'	28,000	105.00
9/16" x 4' x 12'	24,000	135.00
Quartrboard:		
1/4" x 4' x 12'	56,000	30.00
DeLuxe Quartrboard:		
1/4" x 4' x 12'	56,000	42.00
Temprtile:		
1/8" x 4' x 12'	56,000	70.00
5/16" x 4' x1	40,000	90.00

4. Manufacturer's current minimum car lot quantities and current special separate price to fabricators, on the basis of which, until changed by the Manufacturer, the del credere Factor's commissions will be computed on Special Concrete Form Board as provided in Section 7 of the Agreement to which this Schedule is annexed:

	Minimum car lot quantity square feet	Fabricators car lot price per M square feet
Special Concrete Form Board:		
5/16" x 4' x 12'	37,500	$52.00
1/4" x 4" x 12'	28,000	63.00
5/16" x 4' x 12'	22,500	85.00

NOTE.—The foregoing list prices do not include wrapping charges, except on Temprtile. Wrapping charges, except on Temprtile, will be $1.00 extra per M square feet. The foregoing list prices on Temprtile include wrapping, as Temprtile is not shipped unwrapped.

NOTE.—The term "Square feet" as used herein means surface measurement determined by multiplying the length in feet by the width in feet, and without reference to thickness.

356-K

Exhibit S-48

Memorandum of Agreement, entered into as of the 1st day of February 1938, by and between Masonite Corporation, a corporation of Delaware, hereinafter referred to as "Masonite," party of the first part, and The Insulite Company, a corporation of Minnesota, hereinafter referred to as "Insulite," party of the second part, witnesseth:

Whereas the following agreements, among others, between the parties hereto are now in force and effect:

(a) An agreement dated February 2, 1935, commonly known as the "export agreement" and a supplement thereto dated February 8, 1935;

(b) An agreement dated October 29, 1936, modifying and amending the aforesaid export agreement and the aforesaid supplement thereto;

(c) A del credere factor's agreement dated October 29, 1936, under which Insulite is a del credere factor of Masonite; and

(d) A supplementary agreement to the aforesaid del credere factor's agreement, also dated October 29, 1936, relating among other things to non-acknowledgment by Insulite of the validity of Masonite's United States patent No. 1941536, and providing that the acknowledgment of validity of certain of Masonite's patents contained in the above mentioned del credere factor's agreement does not extend to Masonite's foreign patents; and

Whereas Insulite is the owner of certain United States patents and United States patent applications hereinafter identified; and

Whereas, Masonite is the owner of certain Canadian, Finnish, Norwegian, Philippine Island, and German patents, and a German patent application, hereinafter identified; and

Whereas, there is now pending in the United States Patent Office an interference No. 74,562 between patent applications relative to the manufacture of pressed boards owned by Insulite and Masonite respectively; and

Whereas Insulite represents that The Insulite Company of Finland O/Y, hereinafter referred to as "Insulite of Finland," is its wholly owned subsidiary; and

Whereas it is the desire of the parties hereto to amicably dispose of the aforesaid interference and of other matters of conflict which have arisen, or are about to arise, between them;

Now, therefore, in consideration of the premises and of the mutual covenants and promises hereinafter set forth, it is hereby agreed by and between the parties hereto as follows:

1. Insulite hereby grants a license to Masonite under the United States patents and patents maturing on patent applications, relative to the production of pressed boards and pressed fiber products containing 36 lbs. or over of ligno-cellulose per cubic foot and processes and apparatus for the manufacture thereof, listed in "Schedule 1" hereto attached and made a part hereof, and which Insulite covenants are all its United States patents and patent applications relative to the production of pressed boards or other pressed fiber products containing 36 lbs. or over of ligno-cellulose per cubic foot or processes or apparatus for manufacture thereof, such license to be for the life of the last to expire of said patents and of such patents as may be granted on said applications, and to be without payment of royalty, and

to be limited to the manufacture, use, and sale of pressed boards or other pressed fibre products containing 36 lbs. of over of ligno-cellulose per cubic foot, no license being hereby granted for the manufacture, use, or sale of pressed boards or other pressed fiber products containing less than 36 lbs. of ligno-cellulose per cubic foot. Said license shall be exclusive of all persons, firms, and corporations, including Insulite itself, but said exclusion of Insulite itself may be terminated by Insulite at any time upon not less than thirty (30) days' prior written notice thereof to Masonite in the event that the existing del credere agreement between the parties hereto shall no longer be in force or effect. No right or license under United States patents owned by Masonite is granted to Insulite by this agreement, and in case of the termination of said exclusion of Insulite itself from the license rights hereby granted to Masonite, nothing in this agreement shall prevent or estop Masonite from the assertion of its rights under United States patents owned by Masonite.

The license to Masonite granted by this agreement shall be without right of sub-license from or assignment by Masonite to others, except that in case Masonite disposes of all or substantially all of its patent properties, Masonite shall have the right to include with such disposition or transfer, the license rights hereby granted by Insulite to Masonite, but in such transfer, Masonite shall restrict its transferee from granting any sub-licenses to others or from assigning said license unless in connection with a transfer of all or substantially all of the patent properties transferred by Masonite to such transferee.

Insulite agrees to supply Masonite's patent attorneys with copies of the files of the patent applications under which Insulite hereby licenses Masonite.

2. Masonite agrees to assign the existing Masonite patents in Finland as listed in "Schedule 2" annexed hereto and made a part hereof, to Insulite or, if Insulite shall so request in writing, to Insulite of Finland.

3. In anticipation of the making of this agreement, Masonite has heretofore negotiated an agreement with Firma P. Wikstrom jor. and A/S Hunton Bruk, who are Masonite's licensees under its Norwegian patents, which agreement is to become effective only upon the execution of this agreement, and which agreement provides, in part, as follows:

"In return for such alterations in the royalties Hunton agrees to permit Insulite to export from Finland to Norway a total maximum quantity of 225,000 square meters per calendar year of hardboards and semi-hardboards or a proportional quantity for part of calendar year as long as Masonite's Norwegian patents are valid. By hardboards and semihardboards is meant in this con-

tract all boards which have been treated in a press excluding insulation boards, that is porous boards. Insulite undertakes not in any year comprised in this contract to export such boards—directly or indirectly—beyond the maximum fixed an irrespective of whether the said boards are produced by the American or by the Finnish Insulite Company or by any other subsidiary company that may have been formed or may come to be formed by these companies in any country.

"Insulite of Finland or the parent company of Insulite U. S. A. shall pay to Hunton a royalty of 4 ore per square meter on export to Norway of such hardboards and semi-hardboards for duration of this agreement. The responsibility for Insulite's performance of this agreement rests solely with Masonite which undertakes the obligation to control in reliable manner that the above-mentioned quantity is not exceeded in any year and to notify Hunton if there exists reason to suppose that the quantity has been exceeded. Masonite shall at the end of each year, through a recognized firm of auditors, ascertain that Insulite is not exceeding its above-mentioned maximum export and shall as soon as possible send to Hunton the report of the said firm of auditors.

"If Insulite should in any year exceed the maximum export quantity allowed, Hunton shall, in addition to receiving compensation, be entitled to have that maximum in the succeeding time reduced by 20%. Hunton is not entitled to this reduction if Insulite has exceeded the maximum quantity incidentally and only to an extent of obvious minor importance.

"As security for Insulite's and Masonite's engagements under the present contract Masonite shall provide a guarantee from a Norwegian bank, to the amount of Norw. kr. 20,000.00.

"The obligation to pay the said royalty of 4 öre per square meter shall be incumbent on the Insulite Companies in America and Finland jointly and severally, and these companies shall quarterly send to the Masonite Corporation and the Masonite Corporation to Hunton Bruk particulars of the Norwegian sales of Insulite the previous quarter. The royalty shall be paid to Hunton quarterly. Insulite of Finland and Insulite U. S. A. will acknowledge the validity of Masonite's Norwegian patents and will withdraw suit on annulment of Masonite's patents in Norway. Insulite on suit for annulment of validity of patents and Hunton on infringements suit will ask postponement of court proceedings until March 5th, 1938. If Insulite signs contract with Masonite covering the paragraphs herein written then Hunton will withdraw all action for infringement of Masonite's Norwegian patents by Insulite and Jens Frang, and Insulite and Jens Frang shall withdraw their annulment proceedings against Masonite's patents in Norway.

"If Insulite does not sign such contract, infringement suit of Hunton will go forward and Masonite shall defend itself against Insulite's annulment suit.

"This agreement and the agreement with Insulite which it presupposes shall come into force from the first of February this year and shall hold good as long as Masonite's Norwegian patents are valid.

"Cabled confirmation from Masonite U. S. A. that Insulite has signed agreement shall put this agreement into full force and effect. If Hunton has not by the 5th of March this year received such telegram, the parties stand unbound."

Insulite covenants and agrees that it will perform, carry out and abide by all of the terms and provisions above quoted which are to be performed and observed by it as therein set forth, and that it will cause its wholly owned subsidiary Insulite of Finland, to perform, carry out and abide by all of the terms and provisions above quoted which are to be performed and observed by Insulite of Finland as therein set forth, and Masonite covenants and agrees that it will perform, carry out and abide by all of the terms and provisions above quoted which are to be performed and observed by it as therein set forth.

So long as Insulite and Insulite of Finland shall each perform, observe and abide by the requirements imposed upon them respectively, by the terms of the agreement above quoted, Masonite will reimburse Insulite and/or Insulite of Finland for the amount of royalties paid at the rate above quoted upon hard board and semi-hard board so imported into Norway, such reimbursement to be made quarterly promptly following the quarterly payments required to be made by Insulite and/or Insulite of Finland to A/S Hunton Bruk.

Masonite covenants that while Insulite or its said wholly owned subsidiary is operating under the terms of the license in Norway and in compliance therewith, neither Masonite nor anyone claiming under Masonite's Norwegian patents listed in "Schedule 2" attached hereto will assert against Insulite or such subsidiary or their distributors, claim of infringement of said Norwegian patents or similar claim in respect thereof.

4. Masonite hereby licenses Insulite, and empowers Insulite to transfer to Insulite of Finland such license, under the Masonite German patents and any patent maturing on the German patent application listed in said "Schedule 2" hereof, such license to be without the payment of royalty and to extend throughout the life of said patents, to import into and sell in Germany press-manufactured boards, manufactured in Finland.

5. The existing arrangement between the parties with respect to manufacturing hardboard for export sale from International

Falls shall stand without modification except as follows: Insulite shall be permitted to import into Canada, without payment of royalty under Masonite's Canadian patents listed in "Schedule 2" hereof, the hardboard hereafter manufactured in accordance with and to the extent permitted under such existing arrangements.

The option which Masonite now has under such existing arrangements, upon the giving of three months' prior notice, to sell to Insulite its requirements of hardboard for export or to make arrangements for the purchase by Insulite of hardboard manufactured in Europe for such export by Insulite is hereby cancelled. If Insulite shall hereafter desire to discontinue the manufacture of hardboard at International Falls, it may manufacture and import press-manufactured hardboard from Finland to Canada for resale in Canada in quantities not in excess of that which it could manufacture under said existing arrangements at International Falls and shall have the license so to do without payment of royalty under Masonite's Canadian hardboard patents as listed in "Schedule 2" hereof, but subject to the following:

Insulite shall give not less than nine months' prior written notice of its intent to so manufacture and import such press-manufactured hardboard from Finland, and Masonite shall thereupon have an option for a period of 90 days from the giving of such nine months' notice within which it may elect to supply Insulite with its requirements of hardboard for Canadian sale. If Masonite does not so elect within such 90-day period, then Insulite may begin the manufacture and importation of such hardboard from Finland as soon after the expiration of such 90-day period as it may desire. If Masonite elects to supply Insulite with hardboard for sale by Insulite in Canada, such hardboard shall be supplied at prices and upon terms and conditions of sale which shall be, from time to time, not less favorable to Insulite than the prices, terms, and conditions of sale at which Masonite is currently selling or offering to sell to other manufacturers or distributors engaged regularly in the resale of such products in Canada to jobbers, wholesalers, and dealers, and of grade and quality equivalent to that furnished such manufacturers or distributors and sold by Masonite to its own jobbers, wholesalers, and dealers. The privilege hereby given to Insulite to discontinue such manufacture at International Falls and to so manufacture in Finland for import into Canada is not confined to one election to so transfer the place of manufacture, but such place of manufacture may be changed from Finland to International Falls and vice versa, upon like prior notice to Masonite of intent so to do, whereupon, upon each such notice of intent to so change the place of manufacture either from Finland to International Falls or vice versa, Masonite

shall have a like option to elect to furnish hardboard as aforesaid, even though it may not have previously exercised such option.

Masonite hereby releases Insulite from any and all claims for royalty, profits, or damages under Masonite's Canadian hardboard patents listed in "Schedule 2" hereof arising out of importation by Insulite heretofore of hardboard into Canada from International Falls.

6. Masonite hereby grants to Insulite the license under Masonite's existing hardboard Philippine Islands patents listed in "Schedule 2" hereof, and empowers Insulite to transfer such license to Insulite of Finland, to import into and sell hardboard manufactured in Finland in the Philippine Islands without payment of royalty; Masonite, however, to have the right upon not less than six (6) months' prior written notice to Insulite to terminate such license and to import and sell hardboard in the Philippine Islands in case Masonite shall hereafter grant a license to a third party to manufacture hardboard in the Philippine Islands under its said Philippine Islands patents.

7. As to all countries, other than those named in the preceding paragraphs of this agreement, in which Masonite has existing hardboard patents granted prior to January 1, 1936, except the United States and its territories and possessions and Italy, Insulite shall have the license, and the right to transfer to Insulite of Finland or to a wholly owned subsidiary of Insulite, the license to import and sell hardboard either manufactured by Insulite at International Falls under the existing arrangements for manufacture for export only or manufactured in Finland, such license to be without payment of royalty and to extend througout the life of said patents, and any license which may be granted by Masonite to third parties to manufacture hardboard in said countries shall be subject to the right of Insulite and/or its subsidiary to continue the importation and sale of such hardboard in such countries.

8. Masonite shall have the right, at its own election and at its own expense, using Insulite's name, if necessary, to bring suit against infringers of any of the patents and patents maturing on the applications under which Insulite hereby licenses Masonite, and Insulite agrees to cooperate fully with Masonite in any such litigation but at Masonite's own expense, provided that such expenses shall be currently approved by Masonite in writing before being incurred. Masonite agrees to keep Insulite fully advised of the progress and expense of any such litigation. In case Insulite shall terminate its own exclusion from the license rights granted to Masonite under Paragraph 1 of this agreement and thereby procure the right and privilege (whether actually used or not) to practice the invention which is the subject matter of such litigation,

Insulite at the time of such termination of its own exclusion shall reimburse Masonite for one-half the expenses of such litigation.

9. Masonite and Insulite agree to settle interferences now existing or which may hereafter arise during the life of this agreement between claims of applications now pending or patents heretofore issued and owned or controlled by Masonite and of applications now pending or patents heretofore issued and owned or controlled by Insulite relating to or covering pressed board or the manufacture thereof to secure the issue of such claims and of claims for all other additional patentable subject matter common thereto in a valid patent or patents issued in the name of the original and first inventor or inventors thereof; and, in order to secure such proper issue of all such claims, Masonite and Insulite agree that they shall promptly disclose fully to each other, through their designated attorneys, all information, documents or exhibits in their possession or available to them relating to the conception, disclosure, development, completion, and use of the subject matter of such claims, to the end that such designated attorneys shall, if possible, reach an agreement as to priority of inventorship and the securing of a valid patent containing such claims; and upon their attorneys reaching such agreement, Masonite and Insulite hereby agree to execute or to cause to be executed such concessions of priority or disclaimers or other documents as may be required to terminate the interference in accordance therewith, and to cause the same to be filed in the United States Patent Office in connection with such interference or interferences.

In the event that such designated attorneys are unable to reach an agreement as to priority, the said attorneys shall submit the question of priority to a competent, qualified arbiter selected by them by mutual agreement, or, if they are unable to agree upon such arbiter, each shall appoint an attorney not representing either company, which two attorneys shall select such arbiter, their choice being final; and there shall be submitted to such arbiter all information, documents, and exhibits in the possession of or available to the respective companies and their designated attorneys relating to the conception, disclosure, development, completion, and use of the subject matter involved, which said designated attorneys, or either of them, shall desire to be submitted, such information to be reduced to writing and to include written statements of the recollection of witnesses upon all questions desired to be answered by either of said designated attorneys, together with written statements by each of said designated attorneys of the grounds upon which they base their views on priority; and the decision of the arbiter shall be final as between Masonite and Insulite and shall be acted upon by them to terminate the interference as hereinbefore provided upon de-

termination of priority by agreement between their designated attorneys.

It is provided, however, that in the event that parties other than Masonite or Insulite are involved in any such interference or interferences, such interference or interferences shall proceed in due course in the Patent Office, it being understood that the parties hereto will cooperate to the fullest extent in the conduct of such interference or interferences to secure a proper outcome thereof; and in the event that all parties other than Masonite and Insulite are eliminated from such interference prior to the taking of testimony therein, the designated attorneys of Masonite and Insulite shall thenceforth proceed as hereinbefore provided as if the interference had been between Masonite and Insulite alone ab initio.

10. Insulite further agrees that in the event it shall receive any bona fide proposal from any other person, firm, or corporation for the assignment and purchase of all or any of its United States patents or patent applications listed in said "Schedule 1" hereof, which is acceptable to it, Masonite shall have and is hereby given the prior opportunity and privilege of purchase thereof at the same price, terms, and conditions of purchase and sale contained in such other offer, provided that Masonite shall exercise such right within twenty (20) days after receipt of written notice from Insulite of the fact of such other offer and the price, terms, and conditions thereof; and, provided further, that such right of Masonite shall not apply to the assignment and sale of said patents, or any thereof, to a subsidiary of Insulite or of Minnesota and Ontario Paper Company or its successor in reorganization.

11. Insulite and Masonite agree to execute and deliver such instruments as may be required to carry into effect the provisions of this agreement.

12. This agreement and the rights granted hereunder (except as herein otherwise provided) shall not be assigned by either party hereto without the written consent of the other, provided that in the event all or substantially all of the assets, business, and good will of Insulite or Masonite are transferred, this agreement may be assigned to such transferee.

In witness whereof, said party of the first part has caused this agreement to be signed in its corporate name by its President or a Vice President thereunto duly authorized and its corporate seal to be hereto affixed, attested by its Secretary or an Assistant Secretary, and the party of the second part has caused this agreement to be signed in its corporate name by its President or a Vice President thereunto duly authorized and its corporate seal to be

hereto affixed, attested by its Secretary or an Assistant Secretary, all in duplicate and all as of the date and year first above written.

MASONITE CORPORATION,
(Signed) By BEN ALEXANDER,
President.
Party of the First Part.

Attest:

THE INSULITE COMPANY,
(Signed) E. L. SABERSON,
Asst. Secretary.

THE INSULITE COMPANY,
(Signed) R. H. M. ROBINSON,
President,
Party of the Second Part.

Attest:

(Signed) H. F. WOODWARD,
Asst. Secretary.

Schedule 1.—Insulite United States Patents

No.		Date
1,839,660	George H. Ellis, Process for Making Waterproof Insulating Bodies	Jan. 5, 1932
1,900,698	George H. Ellis, Insulating Body	Mar. 7, 1933
1,900,699	George H. Ellis, Waterproof Insulating Body	Mar. 7, 1933
1,905,222	George H. Ellis, Fireproof Bodies and Process of Making the Same	Apr. 25, 1933
1,908,699	George H. Ellis, Means for Feeding Articles to and Withdrawing Them from a Press	May 16, 1933
2,030,625	George H. Ellis, Apparatus for and Process of Making Synthetic Products	Feb. 11, 1936
2,030,626	George H. Ellis, Fibrous Products and Method of Making the Same	Feb. 11, 1936
2,036,466	George H. Ellis, Method of Making Synthetic Products	Apr. 7, 1936

Insulite United States Patent Applications

Ser. No.		
584,566	George H. Ellis, et al., Synthetic Products and Process for Making Same	Jan. 2, 1932
706,556	George H. Ellis, Synthetic Products and Process for Making the Same	Jan. 13, 1934
49,095	George H. Ellis, Apparatus and Method of Producing Vegetable Fiber Products	Nov. 9, 1935
51,831	George H. Ellis, Process of Manufacturing Fibrous Products	Nov. 27, 1935
108,372	George H. Ellis, Hard and Dense Fibrous Product and Method of Making	Oct. 30, 1936
172,736	George H. Ellis, Synthetic Products and Method of Making	Nov. 4, 1937

Schedule 2.—Masonite Canadian Patents

No.		Date
267, 048	Grainless Wood Products & Process of Making the Same (reissued as 286,373, January 8, 1929)	12/28/26
318, 595	Process of Making Composition Boards and the Like and Apparatus Therefor (corresponds to U. S. 1,767,539)	1/5/32
345, 208	Tempered Hardboard (corresponds to U. S. 1,941,536)	10/9/34

Masonite Finnish Patents

14, 381	Improvements in Apparatus and Process of Making Fibre Products (corresponds to U. S. 1,767,539)	6/6/30
13, 282	Corresponds to U. S. 1,663,505	3/22/27
12, 668	Corresponds to U. S. 1,663,504	3/22/27

Masonite German Patents

493, 061	Corresponds to U. S. 1,663,505	1/30/26
496, 360	Corresponds to U. S. 1,663,504	1/30/26
Application Ser. No. M125,514	Tempered Hardboard	Filed Nov. 6, 1933

Masonite Norwegian Patents

48, 722	Corresponds to U. S. 1,663,504	2/11/26
48, 723	Corresponds to U. S. 1,663,505	2/11/26
50, 355	Corresponds to U. S. 1,767,539	5/27/30
55, 648	Corresponds to U. S. 1,941,536	11/8/33

Masonite Philippine Patents

		Both expiring
3711	Corresponds to U. S. 1,663,505	3/20/1945
3712	Corresponds to U. S. 1,767,539	6/24/1947
3713	(Boehm) Corresponds to U. S. 1,941,536	1/2/1951
3715	Corresponds to U. S. 1,663,504	3/20/1945
3725	Corresponds to U. S. 1,663,503	3/20/1945

356-L *Exhibit S-49*

For Beauty—Economy—Durability.

It's right—Masonite.

MASONITE CORPORATION

111 WEST WASHINGTON STREET

Chicago, August 26, 1940.

Supplemental agreement to become effective September 1, 1940, providing for certain changes in practice and procedure under del credere agreement and modifying certain terms and provisions thereof

GENTLEMEN: As a del credere factor of Masonite Corporation, you are aware that Masonite's current fiscal year ends on August 31st, which will be the closing date for taking inventory of Mason-

ite's consigned hardboard products in your possession as factor, and in connection with which the annual footage volume of sales made by the factor during the contract year ended on that date will be computed.

The beginning of Masonite's new fiscal year on September 1, 1940, therefore, is an appropriate time to put into effect certain changes for the purpose of simplifying and clarifying the accounting and inventory procedure for both Masonite and all of its del credere factors and effecting a modification of certain terms and provisions of the del credere agreements relating to the past practice of dealing with "longs" and "shorts" as heretofore defined. Accordingly, the following changes in procedure, in classification of board lengths and in the provisions of the existing del credere agreement between us relating thereto will become effective on September 1, 1940.

1. The former classification of various lengths of hardboard products under the appellation of "longs" and "shorts" will be eliminated from usage, and thereafter the various sizes of Masonite's hardboard products will be classified either as "Standards" or "Standards—Special Sizes," according to length, and such new nomenclature will appear in Masonite's new Dealer Price Lists on its hardboard products to become effective on that date. Except in those cases where Masonite's hardboard products are available in 4′ x 12′ size only, as shown by Masonite's published Dealer Price Lists currently in effect from time to time, Standards will consist of 5′, 6′, 7′, 8′, 9′, 10′, and 12′ lengths; and as to any specified product the published dealer price will presently be the same price per M square feet for all of these lengths, and will be the new current price per M square feet of the 4′ x 12′ size. In the group of "Standards—Special Sizes," formerly classified as "Shorts," certain additional odd lengths will be added, for which orders will be accepted when such lengths are in stock and available for shipment. Such odd lengths will presently consist of 1′ and 1½′ lengths of Quartrboard, DeLuxe Quartrboard and ⅛″ and 3/16″ Tempered and Untempered Presdwood. The changes announced in this paragraph are, of course, changes which Masonite may make without the necessity for any consent by a del credere factor.

2. By Masonite's Special Bulletin dated November 9, 1937, which effected in actual operation certain modifications of the terms of the del credere agreements with respect to "longs" and "shorts," each del credere factor was advised that it was privileged to order certain "longs" therein specified without obligation to take the resultant "shorts," provided that if orders were placed for 4′ x 12′ sizes with request for cutting into "longs" and shorts," or such cutting was subsequently done by the factor, then such resultant "shorts"

could be sold only to the classes of trade to which the factor was permitted to sell 4′ x 12′ boards and "longs." This did not include the right to place independent orders for "shorts," nor did it modify the terms of the del credere agreement relating to orders calling for the cutting of boards into two "longs," i. e., two 6′ lengths or one 4′ x 5′ length and one 4′ x 7′ length. In order to effect the changes herein set forth, said bulletin of November 9, 1937, shall be deemed cancelled, effective at the close of business on August 31, 1940, and likewise the supplementary agreement letter of October 29, 1936, addressed to The Celotex Corporation (the terms of which have been made equally available to all del credere factors) relating to the furnishing of certain Quartrboard "longs" without obligation to take resultant "shorts" shall be deemed cancelled, effective at the close of business on August 31, 1940.

3. Masonite Corporation announces that, effective September 1, 1940, any of the sizes to be shown on its new Price Lists, whether Standards or Standards—Special Sizes, may be ordered by a del credere factor in such quantities as it may desire (subject to the carlot requirement with respect to orders by the factor as provided for in Section 3 of the Del Credere Factors Agreement) either for shipment direct to factor's customers or for factor's consigned inventory, without obligation on the factor's part to order any lengths of Standards—Special Sizes which may result from any cutting done by Masonite to fill any such order. That is, any hardboard product of any size shown on such new Price Lists (which specifically includes sizes heretofore classified as "shorts") may be ordered by you as a del credere factor and such order will be filled by Masonite entirely independent of the placing by you of any order for any other size shown on such Price Lists, subject, of course, to the carlot quantity requirement above mentioned. In thus providing for the del credere factor, the advantage not heretofore available of being able to place orders for Standards—Special Sizes only in those instances where the factor has a definite demand for the same from its trade customers, it is hereby understood and agreed between us that Standards—Special Sizes may be sold by you as such del credere factor only to the classes of trade to which, under our Del Credere Factor's Agreement, you are permitted to sell Standards and only at the prices for such sizes as shall be fixed by Masonite from time to time, and that the provisions of our del credere agreement in conflict with this requirement are hereby modified accordingly.

4. In order to make this program effective with respect to accounting and inventory procedure, each del credere factor will report the amount of all Masonite hardboard products in its pos-

session as consigned inventory, including lengths heretofore classified as "shorts," as of the close of business on August 31, 1940, and such procedure shall be followed in every monthly inventory report thereafter. This requirement will be applicable regardless of whether shipments have been made to factor's plant location or to any of factor's warehouse locations. Except for emergency business, there should be no further occasion for the factor to do any cutting of any inventory stock on hand. However, if such cutting is found necessary, it will be permitted only upon the following conditions:

(a) Only 4′ x 12′ sizes may be cut, and only those types of products may be cut as are shown by Masonite's current Dealer Price List to be offered in Standards—Special Sizes;

(b) Such boards may be cut only once to form two resultant pieces, one of which shall be 5′, 6′, 7′, 8′, 9′, or 10′ in length, and each of such pieces shall be sold only to the classes of trade to which the factor is permitted to sell Standards, and only at such minimum selling prices, maximum terms of sale and conditions of sale and delivery as shall be fixed by Masonite as shown by its current published Dealer Price List;

(c) In the next monthly inventory report of the factor following any such cutting, and thereafter until sold, there must be reflected the changes in sizes of consigned board on hand resulting from such cutting. Such inventory reports must also reflect the reduction in inventory, by sizes, resulting from sales out of the inventory stock so cut.

Under this procedure the factor's monthly inventory report, whether or not any cutting shall be done by the factor, will accurately reflect all increases and reductions of stock in square feet by respective sizes of boards and respective board products. This will make it clear that the factor's accounting and payments to Masonite, and Masonite's monthly billings to the factor for the amounts payable, based on inventory reports, will conform exactly with the quantities and sizes of the respective products sold by the factor during the preceding month.

5. Heretofore the factor has not, under the terms of its del credere agreement, been able to obtain hardboard products heretofore classified as "shorts," except by placing an order for 4′ x 12′ boards to be cut into "longs" and resultant "shorts" or by cutting 4′ x 12′ sizes on hand in its consigned inventory. The factor's actual current commission earned on the sale of such "shorts" was the difference between Masonite's current carlot quantity dealer price for such "shorts" and the net amount due Masonite based on the 4′ x 12′ dealer carlot quantity price in accordance with the current commission schedule provided for in the del credere agreement. To illustrate, taking Masonite's current dealer

price list and excluding the $1.00 wrapping charge which has been added thereto:

(a) If the factor has taken into inventory 1M square feet of ⅛" 4' x 4' Presdwood, which it has subsequently sold at the current carlot dealer price, the result was that the factor's actual current commission amounted to the difference between the sale price of $34.00 per M square feet and the amount remitted to Masonite of $23.10 computed as per the del credere agreement, or $10.90. This is equivalent to 32% of such dealer's carlot sale price.

(b) If such transaction had involved 1M square feet of ⅛" 2' x 4' Presdwood, the factor's actual current commission would have been $6.90, i. e., the difference between the sale price of $30.00 per M square feet and the amount due Masonite of $23.10, computed as per the del credere agreement, or 23% of such dealer's carlot sale price.

Under the new procedure which will allow the factor to order Standards—Special Sizes entirely independent of placing an order for any other sizes, a commission schedule applicable solely to such Standards—Special Sizes as were heretofore classified as "shorts" becomes necessary. Such commission schedule is now established, effective September 1, 1940, pursuant to which the factor will obtain the same actual current commissions in dollar amount with respect to such Standards—Special Sizes which it has heretofore obtained under past procedure. A schedule of such percentages of the dealer carlot quantity price of such sizes as will presently be available and shown in Masonite's new Dealer Price List is hereto annexed marked "Exhibit A" and made a part hereof.

It is, of course, understood that nothing herein contained changes in any way Masonite's reserved right under our del credere agreement to fix and determine from time to time the minimum prices and maximum terms and conditions of sale and delivery at which Masonite's hardboard products may be sold by you as del credere factor.

6. The foregoing changes in the terms and conditions under which Standards—Special Sizes will be available and may be sold by you as our factor makes it necessary to modify the provisions of the del credere agreement relating to the rights of Masonite and yourself as factor with respect to consigned inventory in event of the cancellation of the del credere factor's agreement. Accordingly, the last four sentences of Section 16 of our del

credere agreement as heretofore modified by the next to the last paragraph of the supplementary agreement letter of October 29, 1936, addressed by Masonite to The Insulite Company (the rights under which are equally applicable to you), are hereby cancelled, and in lieu thereof the following shall be substituted:

"As to hardboard products previously shipped to the Factor or any selling agent of the Factor and remaining unsold on the effective date of cancellation, the Factor shall have the unconditional right to return the same to the Manufacturer, and Manufacturer shall promptly give the Factor shipping instructions to properly effect redelivery; provided that, as to damaged boards in possession of the Factor, it shall account therefor as provided for in Section 10 of this Agreement; and provided further, that at the Factor's option it may, as agent for the Manufacturer, continue to hold the same or such part thereof as it may elect and sell the same for the Manufacturer at Manufacturer's minimum selling prices and maximum terms and conditions of sale then currently in effect and account for the sale thereof, all on and subject to like terms and conditions as if the sale thereof were made under this agreement. As to all products so returned, the Manufacturer will refund to the Factor any advances which may have been made by the Factor to the Manufacturer on account thereof, including any freight charges paid by the Factor. The Manufacturer will also pay to the Factor reasonable cartage or handling charges incurred in making redelivery of such hardboard products, f. o. b. cars at Factor's plant or warehouse for the return thereof to the Manufacturer or on the Manufacturer's order."

7. Effective September 1, 1940, all orders from the factor, whether for direct shipment to factor's customer or for consignment to factor's warehouse, must be made out on standard forms now being prepared by Masonite and which will be supplied by Masonite without cost to the factor. Special forms of memorandum invoices showing shipment on consignment for factor's inventory, or shipment direct to factor's customer, as the case may be, will be furnished to factor in connection with acceptance of order and shipment.

As the foregoing constitutes in certain respects a modification of certain of the terms and provisions of our existing del credere agreement, it is in order for you to approve the same. Will you, therefore, please approve the same by signing this agreement and the duplicate hereof in the space provided below for that purpose and returning the signed duplicate to us, whereupon the same will constitute an agreement between us with respect

to the particular matters herein supplementary to, and in modification of, the del credere agreement now in effect.

Yours very truly,

MASONITE CORPORATION,
By E. L. SABERSON,
Vice President.

The foregoing, to become effective September 1, 1940, is hereby approved this — day of August 1940.

By ——— ———, *President.*

Exhibit A—Schedule of Commissions To Be Allowed by Masonite to Del Credere Factor Upon Sale of Standards—Special Sizes

Product and Size:	Commission rate[1]
⅛" Presdwood 4' x 8', 4'.	32%.
⅛" Presdwood, 4' x 1', 1½', 2'.	23%.
⅛" Tempered Presdwood, 4' x 8', 4'.	32% of dealer carlot price for ⅛" Untempered Presdwood of same size plus 10% of the excess of dealer's carlot price for such ⅛" Tempered Presdwood of same size over the said price for such Untempered Presdwood.
⅛" Tempered Presdwood, 4' x 1', 1½', 2'.	23% of dealer carlot price for ⅛" Untempered Presdwood of same size plus 10% of the excess of dealer's carlot price for such ⅛" Tempered Presdwood of same size over the said price for such Untempered Presdwood.
3/16" Presdwood 4' x 1', 1½', 2', 3', 4'.	22%.
3/16" Tempered Presdwood, 4' x 1', 1½', 2', 3', 4'.	22% of dealer carlot price for 3/16" Untempered Presdwood of same size plus 10% of the excess of dealer's carlot price for such 3/16" Tempered Presdwood of same size over the said price for such Untempered Presdwood.
Quartrboard, 4' x 1', 1½', 2', 3', 4'.	30%
DeLuxe Quartrboard, 4' x 3', 4'.	21%
DeLuxe Quartrbroad, 4' x 1', 1½', 2'.	9%

[1] If factor shall be entitled to a graduated additional commission because of total annual footage volume of sales as provided in Section 7 (5) of the del credere agreement, then the following graduated additional commissions will apply on the sale of such Standards—Special Sizes, to wit: if annual sales fall within the Second Bracket shown in the table in said Section 7, 2% additional to the above rates of 32%, 23%, 22%, 30%, 21%, or 9%, as the case may be, will be paid as graduated additional commission; if within the Third Bracket, 3% additional will be paid; if within the Fourth Bracket, 4% additional will be paid; if within the Fifth Bracket, 5% additional will be paid; and if within the Sixth Bracket, 7% additional will be paid.

356—M *Exhibit S–50*

For Beauty—Economy—Durability

It's Right—Masonite.

MASONITE CORPORATION

111 WEST WASHINGTON STREET

Chicago, August 26, 1940.

Supplemental agreement to become effective September 1, 1940, providing for certain changes in practice and procedure under del credere agreement and modifying certain terms and provisions thereof

GENTLEMEN: As a del credere factor of Masonite Corporation, you are aware that Masonite's current fiscal year ends on August 31st, which will be the closing date for taking inventory of Masonite's consigned hardboard products in your possession as factor, and in connection with which the annual footage volume of sales made by the factor during the contract year ended on that date will be computed,

The beginning of Masonite's new fiscal year on September 1, 1940, therefore, is an appropriate time to put into effect certain changes for the purpose of simplifying and clarifying the accounting and inventory procedure for both Masonite and all of its del credere factors and effecting a modification of certain terms and provisions of the del credere agreements relating to the past practice of dealing with "longs" and "shorts" as heretofore defined. Accordingly, the following changes in procedure, in classification of board lengths and in the provisions of the existing del credere agreement between us relating thereto will become effective on September 1, 1940.

1. The former classification of various lengths of hardboard products under the appellation of "longs" and "shorts" will be eliminated from usage, and thereafter the various sizes of Masonite's hardboard products will be classified either as "Standards" or "Standards—Special Sizes," according to length, and such new nomenclature will appear in Masonite's new Dealer Price Lists on its hardboard products to become effective on that date. Except in those cases where Masonite's hardboard products are available in 4′ x 12′ size only, as shown by Masonite's published Dealer Price Lists currently in effect from time to time, Standards will consist of 5′, 6′, 7′, 8′, 9′, 10′, and 12′ lengths, and as to any specified product the published dealer price will presently be the same price per M square feet for all of these lengths, and will be the new cur-

rent price per M square feet of the 4′ x 12′ size. In the group of "Standards—Special Sizes," formerly classified as "Shorts," certain additional odd lengths will be added, for which orders will be accepted when such lengths are in stock and available for shipment. Such odd lengths will presently consist of 1′ and 1½′ lengths of Quartrboard, DeLuxe Quartrboard and ⅛″ and 3/16″ Tempered and Untempered Presdwood. The changes announced in this paragraph are, of course, changes which Masonite may make without the necessity for any consent by a del credere factor.

2. By Masonite's Special Bulletin dated November 9, 1937, which effected in actual operation certain modifications of the terms of the del credere agreements with respect to "longs" and "shorts," each del credere factor was advised that it was privileged to order certain "longs" therein specified without obligation to take the resultant "shorts," provided that if orders were placed for 4′ x 12′ sizes with request for cutting into "longs" and "shorts," or such cutting was subsequently done by the factor, then such resultant "shorts" could be sold only to the classes of trade to which the factor was permitted to sell 4′ x 12′ boards and "longs." This did not include the right to place independent orders for "shorts," nor did it modify the terms of the del credere agreement relating to orders calling for the cutting of boards into two "longs," i. e., two 6′ lengths or one 4′ x 5′ length and one 4′ x 7′ length. In order to effect the changes herein set forth, said bulletin of November 9, 1937, shall be deemed cancelled, effective at the close of business on August 31, 1940, and likewise the supplementary agreement letter of October 29, 1936, addressed to The Celotex Corporation (the terms of which have been made equally available to all del credere factors) relating to the furnishing of certain Quartrboard "longs" without obligation to take resultant "shorts" shall be deemed cancelled, effective at the close of business on August 31, 1940.

3. Masonite Corporation announces that, effective September 1, 1940, any of the sizes to be shown on its new Price Lists, whether Standards or Standards—Special Sizes, may be ordered by a del credere factor in such quantities as it may desire (subject to the carlot requirement with respect to orders by the factor as provided for in Section 3 of the Del Credere Factors' Agreement) either for shipment direct to factor's customers or for factor's consigned inventory, without obligation on the factor's part to order any lengths of Standards—Special Sizes which may result from any cutting done by Masonite to fill any such order. That is, any hardboard product of any size shown on such new Price Lists (which specifically includes sizes heretofore classified as "shorts") may be ordered by you as a del credere factor and such order will

be filled by Masonite entirely independent of the placing by you of any order for any other size shown on such Price Lists, subject, of course, to the carlot quantity requirement above mentioned. In thus providing for the del credere factor, the advantage not heretofore available of being able to place orders for Standards—Special Sizes only in those instances where the factor has a definite demand for the same from its trade customers, it is hereby understood and agreed between us that Standards—Special Sizes may be sold by you as such del credere factor only to the classes of trade to which, under our Del Credere Factors' Agreement, you are permitted to sell Standards and only at the prices for such sizes as shall be fixed by Masonite from time to time, and that the provisions of our del credere agreement in conflict with this requirement are hereby modified accordingly.

4. In order to make this program effective with respect to accounting and inventory procedure, each del credere factor will report the amount of all Masonite hardboard products in its possession as consigned inventory, including lengths heretofore classified as "shorts," as of the close of business on August 31, 1940, and such procedure shall be followed in every monthly inventory report thereafter. This requirement will be applicable regardless of whether shipments have been made to factor's plant location or to any of factor's warehouse locations. Except for emergency business, there should be no further occasion for the factor to do any cutting of any inventory stock on hand. However, if such cutting is found necessary, it will be permitted only upon the following conditions:

(a) Only 4′ x 12′ sizes may be cut, and only those types of products may be cut as are shown by Masonite's current Dealer Price List to be offered in Standards—Special Sizes;

(b) Such boards may be cut only once to form two resultant pieces, one of which shall be 5′, 6′, 7′, 8′, 9′, or 10′ in length, and each of such pieces shall be sold only to the classes of trade to which the factor is permitted to sell Standards, and only at such minimum selling prices, maximum terms of sale and conditions of sale and delivery as shall be fixed by Masonite as shown by its current published Dealer Price List;

(c) In the next monthly inventory report of the factor following any such cutting, and thereafter until sold, there must be reflected the changes in sizes of consigned board on hand resulting from such cutting. Such inventory reports must also reflect the reduction in inventory, by sizes, resulting from sales out of the inventory stock so cut.

Under this procedure the factor's monthly inventory report, whether or not any cutting shall be done by the factor, will accurately reflect all increases and reductions of stock in square

feet by respective sizes of boards and respective board products. This will make it clear that the factor's accounting and payments to Masonite, and Masonite's monthly billings to the factor for the amounts payable, based on inventory reports, will conform exactly with the quantities and sizes of the respective products sold by the factor during the preceding month.

5. Heretofore the factor has not, under the terms of its del credere agreement, been able to obtain hardboard products heretofore classified as "shorts," except by placing an order for 4′ x 12′ boards to be cut into "longs" and resultant "shorts" or by cutting 4′ x 12′ sizes on hand in its consigned inventory. The factor's actual current commission earned on the sale of such "shorts" was the difference between Masonite's current carlot quantity dealer price for such "shorts" and the net amount due Masonite based on the 4′ x 12′ dealer carlot quantity price in accordance with the current commission schedule provided for in the del credere agreement. To illustrate, taking Masonite's current dealer price list and excluding the $1.00 wrapping charge which has been added thereto:

(a) If the factor has taken into inventory 1M square feet of ⅛″ 4′ x 4′ Presdwood, which it has subsequently sold at the current carlot dealer price, the result was that the factor's actual current commission amounted to the difference between the sale price of $34.00 per M square feet and the amount remitted to Masonite of $23.10 computed as per the del credere agreement, or $10.90. This is equivalent to 32% of such dealer's carlot sale price.

(b) If such transaction had involved 1M square feet of ⅛″ 2′ x 4′ Presdwood, the factor's actual current commission would have been $6.90, i. e., the difference between the sale price of $30.00 per M square feet and the amount due Masonite of $23.10, computed as per the del credere agreement, or 23% of such dealer's carlot sale price.

Under the new procedure which will allow the factor to order Standard—Special Sizes entirely independent of placing an order for any other sizes, a commission schedule applicable solely to such Standards—Special Sizes as were heretofore classified as "shorts" becomes necessary. Such commission schedule is now established, effective September 1, 1940, pursuant to which the factor will obtain the same actual current commissions in dollar amount with respect to such Standards—Special Sizes which it has heretofore obtained under past procedure. A schedule of such percentages of the dealer carlot quantity price of such sizes as will presently be available and shown in Masonite's new Dealer Price List is hereto annexed marked "Exhibit A" and made a part hereof.

It is, of course, understood that nothing herein contained changes in any way Masonite's reserved right under our del credere agree-

ment to fix and determine from time to time the minimum prices and maximum terms and conditions of sale and delivery at which Masonite's hardboard products may be sold by you as del credere factors.

6. The foregoing changes in the terms and conditions under which Standards—Special Sizes will be available and may be sold by you as our factor makes it necessary to modify the provisions of the del credere agreement relating to the rights of Masonite and yourself as factor with respect to consigned inventory in event of the cancellation of the del credere factor's agreement. Accordingly, the last five sentences of Section 16 of our del credere agreement are hereby cancelled, and in lieu thereof the following shall be substituted:

"As to hardboard products previously shipped to the Factor or any selling agent of the Factor and remaining unsold on the effective date of cancellation, the Factor shall have the unconditional right to return the same to the Manufacturer, and Manufacturer shall promptly give the Factor shipping instructions to properly effect redelivery; provided that, as to damaged boards in possession of the Factor, it shall account therefore as provided for in Section 10 of this Agreement; and, provided further, that at the Factor's option it may, as agent for the Manufacturer, continue to hold the same or such part thereof as it may elect and sell the same for the Manufacturer at Manufacturer's minimum selling prices and maximum terms and conditions of sale then currently in effect and account for the sale thereof, all on and subject to like terms and conditions as if the sale thereof were made under this Agreement. As to all products so returned, the Manufacturer will refund to the Factor any advances which may have been made by the Factor to the Manufacturer on account thereof, including any freight charges paid by the Factor. The Manufacturer will also pay to the Factor reasonable cartage or handling charges incurred in making redelivery of such hardboard products f. o. b. cars at Factor's plant or warehouse for the return thereof to the Manufacturer or on the Manufacturer's order."

7. Effective September 1, 1940, all orders from the factor, whether for direct shipment to factor's customer or for consignment to factor's warehouse, must be made out on standard forms now being prepared by Masonite and which will be supplied by Masonite without cost to the factor. Special forms of memorandum invoices showing shipment on consignment for factor's inventory, or shipment direct to factor's customer, as the case may be, will be furnished to factor in connection with acceptance of order and shipment.

As the foregoing constitutes in certain respects a modification of certain of the terms and provisions of our existing del credere

agreement, it is in order for you to approve the same. Will you, therefore, please approve the same by signing this agreement and the duplicate hereof in the space provided below for that purpose and returning the signed duplicate to us, whereupon the same will constitute an agreement between us with respect to the particular matters herein supplementary to, and in modification of, the del credere agreement now in effect.

Yours very truly,

MASONITE CORPORATION,
By E. L. SABERSON
Vice President.

The foregoing, to become effective September 1, 1940, is hereby approved this — day of August 1940.

By ——— ———, President.

Exhibit A—Schedule of Commissions To Be Allowed by Masonite to del Credere Factor Upon Sale of Standards—Special Sizes

	Commission rate[1]
1/8" Presdwood, 4' x 3', 4'.	32%.
1/8" Presdwood, 4' x 1', 1½', 2'.	23%.
1/8" Tempered Presdwood, 4' x 3', 4'.	32% of dealer carlot price for 1/8" Untempered Presdwood of same size plus 10% of the excess of dealer's carlot price for such 1/8" Tempered Presdwood of same size over the said price for such Untempered Presdwood.
1/8" Tempered Presdwood, 4' x 1', 1½', 2'.	23% of dealer carlot price for 1/8" Untempered Presdwood of same size plus 10% of the excess of dealer's carlot price for such 1/8" Tempered Presdwood of same size over the said price for such Untempered Presdwood.
3/16" Presdwood, 4' x 1', 1½', 2', 3', 4'.	22%.
3/16" Tempered Presdwood, 4' x 1', 1½', 2', 3', 4'.	22% of dealer carlot price for 3/16" Untempered Presdwood of same size plus 10% of the excess of dealer's carlot price for such 3/16 Tempered Presdwood of same size over the said price for such Untempered Presdwood.
Quartrboard, 4' x 1', 1½', 2', 3', 4'.	30%.
DeLuxe Quartrboard, 4' x 3', 4'.	21%.
DeLuxe Quartrboard, 4' x 1', 1½', 2'.	9%.

[1] If factor shall be entitled to a graduated additional commission because of total annual footage volume of sales as provided in Section 7 (5) of the del credere agreement, then the following graduated additional commissions will apply on the sale of such Standards—Special Sizes, to wit: if annual sales fall within the Second Bracket shown in the table in said Section 7, 2% additional to the above rates of 32%, 23%, 22%, 30%, 21%, or 9%, as the case may be, will be paid as graduated additional commission; if within the Third Bracket, 3% additional will be paid; if within the Fourth Bracket, 4% additional will be paid; if within the Fifth Bracket, 5% additional will be paid; and if within the Sixth Bracket, 7% additional will be paid.

E. L. S.

Exhibit S–51

356–N APPOINTMENT OF AGENT BETWEEN MASONITE CORPORATION AS PRINCIPAL AND ---------- AGENT

Dated March 20, 1941

APPOINTMENT OF AGENT

Hardboard Products

Memorandum of Agreement made and entered into as of March 20, 1941, by and between Masonite Corporation, a Delaware corporation (hereinafter called "Manufacturer") and ---------- ---------- a corporation of the State of ---------- ---------- (hereinafter called "Agent"):

1. Appointment of Agent and Scope of Authority.—Manufacturer hereby appoints Agent a non-exclusive selling agent of Manufacturer with authority to sell hardboard products of the sizes and types hereinafter mentioned manufactured by Manufacturer under United States Letters Patent, to the classes of buyers hereinafter described, in the territory limited to continental United States including Alaska and the Hawaiian Islands, upon terms and conditions of sale to be prescribed from time to time by Manufacturer and for such period as hereinafter defined. Agent hereby accepts appointment as agent of Manufacturer, with authority limited as aforesaid, and agrees to comply with and perform the terms and conditions to be performed on the part of Agent, as stated herein.

2. Classes of Buyers to Which Agent May Sell.—Agent is authorized to sell to the following classes of buyers who are engaged in distributing and reselling such products, to wit: (a) wholesalers approved as such by Manufacturer, (b) retail lumber and building material supply dealers and (c) reserve supply companies approved as such by Manufacturer. Agent may also sell direct to United States Government or any official department thereof. In addition, Agent may sell the hardboard products which Agent is authorized to sell hereunder to such other and further classes of buyers of hardboard products, engaged in distributing and reselling such hardboard products, as Manufacturer may sell any of its hardboard products from time to time and to contractors or builders for building uses if Manufacturer shall adopt a policy of selling to such other classes of buyers, but in no event to industrial purchasers for their use in manufacturing or fabricating processes other than building;

provided, however, that Agent may sell to such other and further classes of buyers only so long as Manufacturer shall engage in selling hardboard products to such other classes of buyers.

Agent has no authority to sell, transfer or dispose of hardboard products except as herein expressly provided; and Agent will not control or attempt to control the prices, terms or conditions upon which any buyer shall resell any hardboard products.

3. Products Agent Is Authorized to Sell.—Agent may sell all types and sizes of hardboard products manufactured and distributed by Manufacturer from time to time for sale to the classes of trade to which Agent is authorized to sell, and in the respective sizes, types and lengths as shown in Manufacturer's catalogues and price lists, provided, however, that Agent is not authorized to sell (a) Special Tempered Concrete Form Board or (b) hardboard products (other than Century of Progress Flooring and Patterned Ceiling) which have been subjected to some additional processing, treatment or fabrication by Manufacturer, other than tempering, priming, coating, dyeing or coloring.

4. Prices, Terms and Conditions of Sale.—All sales and quotations shall be made by Agent at such prices and upon such terms, conditions and provisions as may be established by Manufacturer from time to time for the respective classes of buyers to which Agent is authorized to sell and as Manufacturer shall set forth in its published catalogues and price lists from time to time, copies of which shall be furnished Agent promptly when issued.

Agent will not accept any order for sale or future delivery of hardboard hereunder which does not contain a reasonable force majeure clause approved by Manufacturer.

Agent is not authorized to make warranties or representations in connection with the sale of hardboard which may require Manufacturer to assume liability beyond Manufacturer's obligation to furnish to the buyer at Manufacturer's expense hardboard of the same size, grade and quality originally ordered by buyer, to replace defective hardboard delivered to such buyer pursuant to such sale.

Manufacturer shall give Agent not less than 10 days' prior notice of the effective date of any increases in Manufacturer's selling prices and of any changes in terms, conditions and provisions of sale and delivery in the event that such changes are less favorable than those then prevailing; and shall give Agent not less than 48 hours' prior notice of the effective date of any decrease in Manufacturer's selling prices or of any changes in the terms, conditions and provisions of sale and delivery in the event that such changes are more favorable than those then prevailing. In any event, Manufacturer shall communicate such changes to Agent at the same time that Manufacturer informs

any of its selling outlets of such changes, and Manufacturer shall promptly furnish Agent copies of all Manufacturer's published price lists wherein such changes are set forth.

In the event such increase or decrease is made, the provisions relating to such change, as contained in Manufacturer's applicable published catalogue and price list, shall be observed by Agent. Agent shall furnish Manufacturer inventories of consignment stocks as of the dates on which price changes become effective.

Agent shall not sell hardboard products on combined bids or in any other manner which does not fully disclose to the buyer the prices, terms and conditions of sale and delivery on which such hardboard products are offered for sale.

5. Consignment Stocks.—Manufacturer shall maintain at such of Agent's plants or warehouses as Agent may designate consignment stocks of hardboard products, the quantity of which, in so far as practicable, shall approximate two months' estimated deliveries on sales made by Agent from consignment stocks. All hardboard in consignment stocks shall be and remain the property of Manufacturer until ownership passes from Manufacturer to a buyer. Such consignment stock in the types and sizes as furnished by Manufacturer, until it shall be sold or disposed of in accordance with Agent's authority hereunder, shall be stored and housed by Agent in its plants or warehouses in such manner as to afford ready inspection and identification by Manufacturer, and any duly authorized representative of Manufacturer shall have access at all times during business hours to the place or places where said hardboard is so stored and held. Said products shall be kept properly segregated and identified as the property of Manufacturer, and Agent shall furnish and maintain suitable signs indicating the fact that the hardboard so stored is the property of Manufacturer. Agent shall not cut, fabricate or process any consignment stock.

6. Return of Consignment Stocks.—Agent shall return to Manufacturer (at Manufacturer's expense) at any time when directed by it all or any part of the consignment stock which has not been sold. Agent shall return to Manufacturer (at Manufacturer's expense) all unsold hardboard in consignment stock, as well as all undistributed samples, within 10 days after the termination of the appointment of Agent.

7. Deliveries.—Agent is hereby authorized to make sales and deliveries from consignment stocks and to accept and transmit to Manufacturer orders for hardboard products to be delivered direct by Manufacturer to buyers on orders obtained by Agent, but subject to the conditions and limitations herein provided.

8. Freight, Taxes, Insurance, Handling Expense, etc.—Manu-

facturer shall pay freight charges from Manufacturer's plant at Laurel, Mississippi, to Agent's warehouses on all consignment stocks furnished Agent hereunder. Manufacturer shall also pay all taxes imposed upon consignment stocks and shall insure such consignment stocks against loss or damage by fire and other usual hazards. Agent shall pay all expenses for storage, cartage, transportation (except freight on original consignment stocks), and in addition all other costs, outlays, and expenses in connection with, or incidental to, the handling of consignment stocks or the making of sales or deliveries therefrom; but Agent shall not be liable for taxes, excises, fees, or other governmental charges which Manufacturer is required to absorb pursuant to any provision of law applicable to sales made hereunder.

9. Shipments.—All shipments, whether for consignment stocks or to buyers pursuant to orders obtained by Agent, shall be made from Manufacturer's plant at Laurel, Mississippi, loaded in railroad cars only. Manufacturer shall not be obligated to make shipments other than in amounts necessary to make or complete carlot quantities, but such carlot quantities may be diversified as between the various hardboard products or such other products of the kind and character now or hereafter manufactured or distributed by Manufacturer, if, under railroad tariff classifications in effect at the time of shipment, the same may be combined with hardboard products at the same freight rate or combined under any other conditions utilized by Manufacturer in its sales to any of its buyers of the classes to which Agent is authorized to sell.

10. Equal and Ratable Treatment.—Manufacturer shall secure to buyers obtained by Agent, as favorable treatment in respect of promptness in filling orders as is granted by Manufacturer to any other of its buyers of the classes to which Agent is authorized to sell hereunder. In event the aggregate demand for Manufacturer's hardboard products from all sources is in excess of Manufacturer's capacity so as to require the scaling down of shipments, Manufacturer shall, during the time such condition exists, afford ratable treatment to Agent's orders by prorating all shipments of hardboard products including shipments on orders obtained by Manufacturer's own employees (but not including Manufacturer's orders from industrial purchasers for (a) sizes less than 4′ x 5′ boards resulting from the normal accumulation of such lengths, (b) off grade board, or (c) hardboard products to be used in connection with fabrication or manufacturing processes for national defense, other than housing) on the basis of shipments made to buyers during the ninety (90) day period immediately preceding the commencement of such scaling down of shipments.

Manufacturer shall not grant to any agent authority to sell Manufacturer's hardboard products to the classes of buyers to which Agent is authorized to sell hereunder which contains more favorable terms or provisions than are contained herein without extending the same to Agent hereunder, provided, however, that (a) the making or continuing by Manufacturer of different net compensation to offset geographical disadvantages, or (b) the making or continuing by Manufacturer of special concessions in good faith to settle litigation, shall not be deemed the granting of more favorable terms or conditions to any other agent.

11. Proceeds Held in Trust, etc.—Sales of hardboard products may be made by Agent either in the name of Manufacturer or in the name of Agent, as agent, provided such agency is disclosed. All hardboard products which Agent is authorized to sell hereunder (whether shipped direct by Manufacturer on orders obtained by Agent or delivered from consignment stocks) shall remain the property of Manufacturer until ownership shall pass from Manufacturer to buyer, and no ownership in said hardboard products shall vest in Agent at any time. The proceeds of all hardboard sold shall be held in trust for the benefit and for the account of Manufacturer until fully accounted for as hereinafter provided.

12. Reports by Agent.—Agent shall render to Manuacturer not later than the 20th day of each month a report on forms provided by Manufacturer covering sales made by Agent during the preceding calendar month and a complete itemized report or inventory of all of Manufacturer's hardboard products on hand and in the custody of Agent at the close of the last day of business in the preceding calendar month. Agent shall also render at the termination of its appointment a similar report of all such hardboard products.

13. Remittances.—Not later than the 20th day of each calendar month Agent shall account for and remit to Manufacturer all amounts collected by Agent up to the end of the preceding calendar month as proceeds of the sale of hardboard products sold hereunder, after deducting therefrom the current commissions of Agent with respect to such products computed in the manner provided in Schedule A annexed hereto.

14. Examination of Agent's Accounts.—Agent shall keep complete and accurate records and books of account containing full data and information in respect of all of its transactions in connection with its handling, sale and distribution of Manufacturer's hardboard products hereunder, and such books and records shall be open at all times during business hours to inspection and examination by Manufacturer.

15. Guaranties by Agent.—Agent guarantees the due and prompt payment to Manufacturer for all sales effected by Agent hereunder. On the 20th day of each calendar month Agent shall pay to Manufacturer any balance due Manufacturer with respect to any such guaranteed account which remained unpaid for a period of more than 60 days as at the last day of the preceding calendar month. Such payment shall constitute full performance of the guaranty of Agent in respect of the account so paid and thereupon Manufacturer shall assign all interest in such account to Agent.

Agent shall indemnify Manufacturer for all damages sustained in respect of hardboard lost, missing, or damaged while in custody of Agent as a result of the negligence of Agent.

16. Agent's Sales Efforts, etc.—Agent represents that at present it maintains and for a number of years it has maintained a Nation-wide organization, skilled and trained in the selling, distributing and promoting the use of building materials. Agent agrees that at all times while this agreement remains in effect it will utilize such organization (consistent with its other business) actively to promote the sale of Manufacturer's hardboard products throughout the territory and to the classes of trade in which and to which Agent is authorized to sell hereunder.

17. Marking, etc.—All hardboard products of Manufacturer (or the packages, if wrapped) which Agent is authorized to sell or may sell hereunder, including samples, may be labeled with Agent's trade-marks or trade names, provided the labels clearly disclose that with respect thereto Agent is acting solely as agent for Manufacturer. Neither Agent nor Manufacturer shall assert any right or interest in any trade-marks or trade names of the other by reason of the existence of this agency.

Manufacturer may mark its hardboard products (or the packages, if wrapped) sold by Agent with such patent notice as it may be advised by counsel is necessary for its protection, but no such marking shall in any manner deface such hardboard products nor in any manner differ from the marking so used by Manufacturer on such hardboard products sold by Manufacturer on orders obtained by Manufacturer's employees.

18. Samples.—Manufacturer shall supply Agent, without cost to Agent, Manufacturer's standard sized samples (cut to size only) of the various hardboard products which Agent is authorized to sell hereunder in such quantities as Manufacturer may reasonably determine are required to promote the sale by Agent of hardboard products for Manufacturer. Agent shall acquire no title or ownership in samples.

19. Patent Indemnity.—Manufacturer hereby warrants that the hardboard products which Agent is authorized to sell here-

under, when used for the general purposes for which such hardboard products are customarily designed or intended, will not infringe any United States Letters Patent not owned or controlled, either directly or indirectly, by Manufacturer; and Manufacturer will save harmless and protect Agent, as well as Manufacturer's customers sold by Agent, against any claim or demand based on an alleged infringement of any such other United States Letters Patent. If Agent shall notify Manufacturer of the existence of such suit, Manufacturer shall appear and defend, at its own expense, any and all suits at law or in equity arising from such alleged infringement, provided always that Manufacturer shall have full control of the defense of any such suit.

20. Representation of Quality, etc.—Manufacturer agrees that all hardboard products in consignment stocks furnished to Agent or delivered pursuant to orders obtained by Agent shall be of the grade and quality currently offered for sale by Manufacturer through its own employees to the classes of trade to which Agent is authorized to make sales.

21. Compensation.—For its services as Agent hereunder Manufacturer agrees to pay Agent compensation in respect of hardboard products sold by Agent at the rates set forth in Schedule A annexed hereto, and Agent, in making its remittances to Manufacturer, is authorized to deduct and retain the amounts of current commissions as provided in said Schedule.

22. Employee of Agent Not to be Employee of Manufacturer, etc.—Neither the making of this agreement, the acceptance of appointment of Agent hereunder, the performance of any of the provisions hereof, nor the making of any sales hereunder shall constitute or be construed as constituting any person employed by Agent an employee of Manufacturer for any purpose whatsoever.

Agent shall indemnify and hold Manufacturer harmless against all loss and costs sustained by reason of damages to persons or property resulting from the negligent handling by Agent of consignment stocks of hardboard, including reasonable attorneys' fees and disbursements which Manufacturer may incur in defending any claim asserted against Manufacturer for such damages.

23. Term.—The term of this agency shall commence as of the date hereof and continue until March 20, 1945, provided that said term shall be automatically extended from year to year thereafter, subject, however, to (a) termination at any time by either party for cause as defined in Paragraph 24 hereof, or (b) termination by Agent at any time prior to March 20, 1945, by giving to Manufacturer not less than six (6) months' previous

written notice of its intention so to do, or (c) termination on March 20, 1945, or any time thereafter, by either Manufacturer or Agent upon giving to the other not less than six (6) months' previous written notice of intention so to do. In event of the termination of this agency by notice, as provided herein, Manufacturer will not be required to make shipments on sales made by Agent or to Agent's consignment stocks at a rate in excess of Agent's average monthly shipments during the six months' period immediately preceding the receipt of the notice of termination.

24. Rights to Terminate.—Either party may terminate this Agreement by written notice to the other, upon the happening of any one or more of the following events:

(a) Failure of the other party to perform or comply with any of the provisions to be performed on its part hereunder: provided, however, that in event of unintentional or inadvertent default the party concerned shall have the right to prevent such cancellation from going into effect by correcting or discontinuing such default within thirty days of the date on which the notice of default was mailed to it;

(b) The insolvency, receivership, or bankruptcy of the other party or an assignment by the other party for the benefit of its creditors;

(c) The filing and approval of a petition for the reorganization of the other party under the provisions of Chapter X of the Bankruptcy Act as now in force or as hereafter amended or under any similar act for the relief of debtors.

25. Right of Assignment.—This agreement and the appointment of Agent hereunder is personal in character and neither this Agreement nor any of the rights, interests, privileges, or obligations hereunder shall be assignable or transferable by Agent without the express written consent of Manufacturer first had and obtained. However, Manufacturer will consent to the assignment hereof, together with all rights and interests hereunder, to such concern as shall acquire all or substantially all of the assets and going business of Agent, provided such assignee by written instrument shall accept appointment as successor agent hereunder, assume all obligations of Agent hereunder, and agree to be bound by all the terms and provisions hereof.

26. Superseding Previous Agency Agreements.—When this Agreement shall have been duly executed by the parties and delivered pursuant to authorization by each of the parties, this Agreement shall supersede in all respects the existing agreement between Manufacturer and Agent dated _____, 19__, and any supplement or supplements thereto, which said agreement and

said supplements shall thereby be and become terminated in all respects, anything therein to the contrary notwithstanding.

In witness whereof, the parties have executed this Agreement this day of , 1941, although to be effective as of the date and year first hereinabove written.

MASONITE CORPORATION,
By ------ ------, *President.*
By ------ ------, *President.*

Schedule A—Agent's Compensation Schedule

Column No. 1 of the following Schedule sets forth the percentages of Manufacturer's Dealer Carlot Prices for the respective types and sizes of hardboard products at which Agent's current commissions shall be computed. Such computation shall be on said Dealer Carlot Prices in effect at the time of sale by Agent, and Agent will remit to Manufacturer only the entire difference between such Dealer Carlot Prices and the percentages thereof so computed, except that at the same time Agent makes a remittance to Manufacturer for hardboard products sold out of consignment stock Agent will also remit to Manufacturer an amount equal to the freight payments made by Manufacturer on account of the products so sold covering the original shipment of such products from Manufacturer's plant for such consignment stock.

Columns Nos. 2, 3, and 4 set forth the respective percentages by which the percentages appearing in Column No. 1 will be increased at the end of each of Manufacturer's fiscal years (August 31 of each year) and applied to the Dealer Carlot Prices in effect at the time of sale by Agent during such fiscal year if Agent's aggregate volume of sales for such year exceeded 15,000,000 square feet, surface measurement, the applicable column to be determined by such aggregate volume of sales. Such excess annual commissions shall be computed and paid within sixty (60) days following the close of each such fiscal year.

With the exception of Manufacturer's hardboard product sold under its trade name of "Temprtile," no commission will be allowed on the increased Dealer Carlot Price of any hardboard product by reason of the fact that such product is tempered, and no commission will be allowed on the increased Dealer Carlot Price of any hardboard product by reason of the fact that such product is colored, dyed, primed, coated, or similarly processed or treated.

Rate of Compensation on Different Annual Sales Volumes—Surface Measurement

	Base Rate	Rates of additional compensation for quantity		
	No. 1 Up to 15 million sq. ft.	No. 2 15 to 20 million sq. ft.	No. 3 20 to 25 million sq. ft.	No. 4 Over 25 million sq. ft.
Standards:				
¼" Presdwood	49%	1%	3%	4%
¼" Temprtile	49%	1%	3%	4%
5/16" Temprtile	49%	1%	3%	4%
5/16" Presdwood	43%	1%	3%	4%
¼" Presdwood	43%	1%	3%	4%
5/16" Presdwood	43%	1%	3%	4%
Quartrboard	36%	1%	1%	3%
Deluxe Quartrboard	36%	1%	1%	3%
⅜" Wallboard	36%	1%	1%	3%
Standards—Special Sizes:				
⅜" Wallboard	26%	1%	1%	3%
All others	31%	1%	1%	3%

357 *Exhibit S-52*

Agreement made this 7th day of April 1941 by and between Masonite Corporation, a Delaware Corporation, having an office at Chicago, Illinois, party of the first part, and The Celotex Corporation, a Delaware Corporation, having an office at Chicago, Illinois, party of the second part, witnesseth that

Whereas, The Celotex Corporation and Masonite Corporation have made and executed on even date herewith an agreement entitled "Appointment of Agent," to which this agreement is supplementary, and which said "Appointment of Agent" agreement supersedes and cancels all former agency agreements between the parties; and all supplements thereto; and

Whereas, the parties hereto desire to supplement said "Appointment of Agent" as incorporated in numbered paragraph 1 and 2 of this agreement;

Now, therefore, in consideration of these premises aforesaid, it is hereby mutually agreed as follows:

1. In the event the Supreme Court, or any court of inferior jurisdiction from which no appeal is taken; should hold, in any proceeding, subsequent to the final decree in the suit of Masonite Corporation, Plaintiff, vs. The Celotex Company, and Colin C. Bell and Hobart P. Young, Receivers of The Celotex Company, No. 871 in Equity, in the District Court of the United States for the District of Delaware, that Patent No. 1,663,505 is invalid or should substantially limit the scope of the claims thereof, Masonite Corporation agrees that The Celotex Corporation shall
358 be accorded the benefit of such decision and relieved from the estoppel of the decree in the aforesaid litigation

against The Celotex Company and said receivers to the extent indicated by such later decision. It is understood that the foregoing provisions relating to relief from estoppel shall not be operative so long as Masonite Corporation shall in good faith continue to litigate the question of validity and/or infringement of said patent. It is further understood and agreed that the estoppel of the aforesaid decree of the United States District Court in the aforesaid litigation shall continue in force and effect against The Celotex Corporation and the provisions as to relief from estoppel herein contained shall also continue in force and effect throughout the term of said patent No. 1,663,505.

2. Masonite Corporation agrees that the provisions of the said final decree in said patent infringement suit with respect to its waiver of an accounting and waiver of all claims for profits and damages by reason of the past infringement shall be deemed and construed to continue in force and effect for the benefit of The Celotex Corporation as the successor in interest to the parties defendant in said patent litigation.

In witness whereof, Masonite Corporation has caused this Agreement to be signed in its corporate name by its President or a Vice President thereunto duly authorized and its corporate seal to be hereto affixed, attested by its Secretary or an Assistant Secretary, and The Celotex Corporation has caused this Agreement to be signed in its corporate name by its President or a Vice President thereunto duly authorized and its corporate seal to be hereto affixed, attested by its Secretary or an Assist-
359 ant Secretary, all in duplicate and all as of the date and year first above written.

MASONITE CORPORATION,

[SEAL] (Signed) By BEN ALEXANDER,
President.

Attest:

(Signed) J. M. COATES,
Asst. Secretary.

THE CELOTEX CORPORATION,

[SEAL] (Signed) By O. S. MANSELL,
Vice President.

Attest:

(Signed) M. B. MUSGRAVE,
Assistant Secretary.

360 *Exhibit S–53A*

Re Agreement of February 1, 1938

THE INSULITE COMPANY,
1100 Builders Exchange, Minneapolis, Minnesota.

GENTLEMEN. The new agreement entitled "Appointment of Agent" dated as of March 20, 1941, between Masonite Corporation and The Insulite Company, provides for the termination of the prior Del Credere Factor's Agreement of October 29, 1936, and all Supplements thereto. However, it is desired to continue in effect the agreement made between us as of the 1st day of February 1938, and to make clear that said agreement is not one of the "Supplements" to be terminated by the new agreement, it is hereby agreed between us as follows:

1. The agreement of February 1, 1938, and the provisions thereof are hereby continued in full force and effect.

2. The reference in Section 1 of said agreement of February 1, 1938, to "the existing del credere agreement between the parties hereto" shall be construed as though reading: "the agreement of March 20, 1941, entitled 'Appointment of Agent.'"

Please indicate your approval of the foregoing by signing the duplicate of this letter and returning such signed duplicate to us.

Dated at Chicago, Illinois, this 20th day of March 1941.

MASONITE CORPORATION,
(Signed) By BEN ALEXANDER,
President.

The above is hereby approved and accepted.

THE INSULITE COMPANY,
(Signed) By R. H. M. ROBINSON,
President.

361 *Exhibit S–53B*

Re Export Agreement

THE INSULITE COMPANY,
1100 Builders Exchange, Minneapolis, Minnesota.

GENTLEMEN. The new agreement entitled "Appointment of Agent" dated as of March 20, 1941, between Masonite Corporation and The Insulite Company, provides for the termination of the prior Del Credere Factor's Agreement of October 29, 1936, and all Supplements thereto.

However, it is desired to continue in effect the Export Agreement made between us, dated February 2, 1935, as modified by Supplemental Agreement thereto dated February 8, 1935, and

as later modified by the agreement between us of February 1, 1938, and to make clear that this Export Agreement as so modified is not one of the "Supplements" to be terminated by the new agreement, it is hereby agreed between us that the said Export Agreement and the provisions thereof, as modified, are hereby continued in full force and effect.

Paragraph 8 of said Export Agreement shall be construed as though reading:

"This agreement shall not be assignable without the consent of Masonite and shall be cancelable by either party on thirty days' notice on or after the expiration or cancellation of the agreement of March 20, 1941, between the parties hereto, entitled "Appointment of Agent'"

Please indicate your approval of the foregoing by signing the duplicate of this letter and returning such signed duplicate to us.

362 Dated at Chicago, Illinois, this 20th day of March 1941.

Respectfully submitted.

MASONITE CORPORATION,

(Signed) By BEN ALEXANDER,

President.

The above is hereby approved and accepted.

THE INSULITE COMPANY,

(Signed) By R. H. M. ROBINSON,

President.

Exhibit S–54

Trade-Marks and Brand Names Used by Masonite Corporation and Its Del Credere Factors

	Quartrboard	DeLuxe Quartrboard	Presdwood	Tempered Presdwood	Temprtile
Masonite Corporation	Masonite Quartrboard, U. S. Pat. No. 1663504.	Masonite DeLuxe Quartrboard.	Masonite Presdwood, U. S. Pat. No. 1663505.	Masonite Tempered Presdwood, U. S. Pat. No. 1663505.	Masonite Presdwood Temprtile, U. S. Pat. No. 1663505.
Celotex Corporation	Studio Board [1]	Panel Board [1]	Hardboard [1]	Tempered Hardboard [2]	Tempered Hard Tile.[1]
Certain-teed Products	Beaver Dense Wood	Beaver DeLuxe Dense Wood.	Beaver Hard Board	Beaver Tempered Hard Board.	Beaver Dense Tile.
Hawaiian-Cane Products	Canec Dense Board	Canec Dense Board DeLuxe.	Canec Hard Board	Canec Tempered Hard Board.	Canec Dense Tile.
Armstrong Cork Products	Armstrong's Temboard	Armstrong's Temboard DeLuxe.	Armstrong's Temwood	Armstrong's Tempered Temwood.	Armstrong's Blocked Temwood.
National Gypsum Co.	Gold Bond ¼" Panel Board.	Gold Bond ¼" DeLuxe Panel Board.	Gold Bond Hard Board	Gold Bond Tempered Hard Board.	Gold Bond Hardboard Tile.
Wood Conversion Co.	¼" Semi-Tuff-Wood [1]	DeLuxe ¼" Semi-Tuff-Wood.[1]	Standard Tuff-Wood [1]	Tempered Tuff-Wood [1]	Tuff-Wood Tempered Tile.[1]
Johns-Manville	Johns-Manville Standard PanLBoard.	Johns-Manville DeLuxe PanLBoard.	Johns-Manville Hard Board.	Johns-Manville Tempered Hard Board.	J-M Scored Hardboard.[1]
Insulite Company	Insulite Dualboard	Insulite DeLuxe Dualboard	Insulite Hardboard	Insulite Tempered Hardboard.	Insulite Paneltile.
Flintkote Company	Flintboard [1]	DeLuxe Flintboard [1]	Flintkote Hardboard [1]	Flintkote Tempered Hardboard.[1]	Flintkote Flintile.[1]
Dant & Russell, Inc.	Fir-Tex Hardwal	Fir-Tex Super Hardwal	Fir-Tex Hardboard	Fir-Tex Tempered Hardboard.	Fir-Tex Tempered Hardboard Tile.

[1] Indicates products which are not branded.
[2] Celotex Tempered Hardboard branded "Tempered."

Exhibit S–56

STATEMENT OF AGGREGATE QUANTITY OF HARDBOARD PRODUCTS SOLD ANNUALLY, BY FOOTAGE AND BY VOLUME

(The years shown are fiscal years ended August 31)

AGGREGATE NUMBER OF SQ. FT. ON ⅛" BASIS

	1927	1928	1929	1930	1931	1932	1933	1934	1935	1936	1937	1938	1939	1940
Agasote Millboard Co. and/or Homasote Co.								490,956	1,226,768	1,927,684	1,929,904	1,080,590	172,532	
Armstrong Cork Company								964,158	3,160,738	3,119,370	3,722,795	3,306,102	2,754,088	2,232,636
Celotex Corporation [1]								15,858,796	24,347,060	29,819,001	36,323,349	28,563,496	24,275,706	27,222,913
Certain-Teed											6,410,888	4,291,980	2,568,699	4,118,746
Dant & Russell Inc.												1,285,322	3,415,736	2,361,946
Flintkote Company, The											1,047,844	2,628,915	3,087,885	3,953,669
Hawaiian Cane Products Ltd. and Certain-teed Products								2,990,114	4,695,212	6,224,688				
Hawaiian Cane											724,048	763,764	839,020	733,056
Insulite Company, The									2,076,252	6,285,858	9,343,241	6,353,762	6,760,809	6,670,379
Johns-Manville Sales Corp.								1,427,212	4,399,708	6,184,206	7,845,872	7,493,006	8,275,646	10,147,133
National Gypsum Company								1,897,856	3,243,956	3,243,024	3,672,710	4,113,140	6,229,446	6,857,872
Wood Conversion Company								886,312	4,263,964	5,185,928	7,839,984	6,698,218	7,303,372	8,118,967
Total agents' sales								24,515,404	47,413,658	61,989,759	78,860,635	66,688,295	65,708,929	72,417,317
Masonite Export Sales [2]							1,390,008	1,876,391	4,872,583	6,548,674	9,438,347	11,454,652	14,027,461	12,953,200
Masonite Industrial Sales [2]							10,427,580	11,913,957	16,661,613	34,352,310	34,229,694	50,987,709	66,235,289	91,054,938
Masonite (all others)	6,097,181	17,226,046	36,402,339	49,814,154	64,041,879	51,709,114	33,570,472	44,140,115	56,237,921	61,545,514	69,313,919	55,531,193	60,287,672	67,292,356
Grand total	6,097,181	17,226,046	36,402,339	49,814,154	64,041,879	51,709,114	45,388,150	82,445,867	125,185,775	164,436,257	211,842,595	184,661,849	206,259,451	243,717,897

NET DOLLAR VOLUME AFTER DEDUCTION OF COMMISSIONS

Agasote Millboard Co. and/or Homasote Co.								$10,664.87	$28,425.05	$47,950.07	$50,030.49	$30,038.85	$2,553.91	
Armstrong Cork Company								21,107.71	76,712.05	80,272.91	95,144.49	87,247.44	72,823.94	$60,713.80
Celotex Corporation [1]								317,789.76	526,163.02	705,934.83	846,286.35	711,107.23	640,372.28	725,307.79
Certain-Teed											160,095.50	117,737.79	117,672.14	119,584.45
Dant & Russell Inc.												38,900.00	55,419.10	76,001.48
Flintkote Company, The											26,091.72	70,053.29	80,997.23	107,740.71
Hawaiian Cane Products Ltd. and Certain-teed Products								71,164.59	117,384.73	162,472.74				
Hawaiian Cane											21,970.84	26,144.65	28,922.19	23,289.91
Insulite Company, The									47,679.45	154,527.32	228,905.18	172,699.27	179,908.76	182,084.66
Johns-Manville Sales Corp.								31,885.99	100,424.24	149,075.62	184,915.10	182,585.52	208,157.35	268,833.11
National Gypsum Company								41,931.03	78,428.37	82,989.75	99,255.48	114,552.63	172,268.18	189,277.24
Wood Conversion Company								19,377.83	100,539.70	133,656.85	200,620.44	176,521.98	205,881.21	228,725.03
Total agents' sales								$514,121.78	$1,075,756.61	$1,516,820.09	$1,912,415.59	$1,727,718.65	$1,764,736.29	$1,982,158.18
Masonite Export [2]							$45,603.54	$72,925.25	$193,336.67	$249,064.42	$369,081.55	$447,831.85	$541,398.40	$496,738.20
Masonite Industrial [2]							295,049.18	301,392.99	416,923.14	847,629.35	1,428,258.71	1,256,000.81	1,732,104.19	2,551,623.84
Masonite (all other)	$195,359.45	$601,164.20	$1,305,992.06	$1,649,665.23	$2,048,964.62	$1,726,303.52	1,268,524.06	1,649,429.55	1,990,181.93	2,422,498.03	2,839,679.56	2,208,848.32	2,443,457.66	2,791,277.33
Grand total	$195,359.45	$601,164.20	$1,305,992.06	$1,649,665.23	$2,048,964.62	$1,726,303.52	$1,609,176.78	$2,537,869.57	$3,676,198.35	$5,035,981.89	$6,549,435.41	$5,640,402.25	$6,481,696.47	$7,821,797.55

[1] Celotex export figures included in above. [2] Industrial and Export Sales not kept separately prior to 1933.

NOTE.—In the above table Agasote Millboard Company and Homasote Company are combined for the reason that they are not two separate agents. There was merely a change in corporate name during the year 1937.

438340—42 (Face p. 420)

364–A *Exhibit S–57 (Plaintiff's Exhibit 28)*

ANNUAL FOOTAGE SALES OF HARDBOARD PRODUCTS BY THE INSULITE COMPANY

Year	Sales to dealers, wholesalers, U. S. Govt. agencies, etc.	Sales to industrial	Sales in export	Insulite's own manufactured production	Total all hardboard
1932	(1)	(1)		4,577,994	4,577,994
1933	3,011,820	1,351,943	4,741,953	9,105,716	9,105,716
1934	2,562,916	983,959	4,098,757	7,645,632	7,645,632
1935	3,797,069	430,171	6,171,558	7,246,896	10,398,798
1936	6,136,955	173,125	3,116,688	3,116,688	9,426,768
1937	7,375,705	448,128	3,331,920	3,331,920	11,155,753
1938	6,392,609	41,808	624,864	624,864	7,059,281
1939	6,421,725		1,735,872	1,735,872	8,157,597

(1) Classification not available.

NOTE.—Figures are on surface footage basis without regard to thickness.

366 *Exhibit S–58*

UNITED STATES GYPSUM COMPANY
300 West Adams St.
CHICAGO

MAY 15, 1934.

The MASONITE CORPORATION,
111 West Washington Street, Chicago, Illinois.

GENTLEMEN. We agree to buy from you, and you agree to sell to us, your standard quarter board and other products of your manufacture subject to the following terms and conditions:

QUANTITY

Such quantities of standard quarter board and other products of your manufacture as we may order in writing from time to time.

QUALITY

Your standard quarter board and other products delivered hereunder shall be of merchantable quality and suitable for the purpose for which purchased and shall be at least equal in quality to products of the same kind and nature regularly sold to other purchasers. When ordered bundled, your standard quarter board shall be securely wrapped in your standard bundles, with six pieces in long bundles and ten pieces in short bundles. No labels or marks of any kind are to be applied to

the board or bundles except at our direction. If we so indicate, you will brand board with our name or trademark. All standard quarter board shall be 12-foot board with one cut (i. e. we must take two 6-ft. lengths; one 8-ft. and one 4-ft. length; etc.), as specified in written order.

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SERVICE

All products ordered hereunder shall be shipped from your plant at Laurel, Mississippi, promptly on receipt of our order; provided, however, that you shall not be obliged to ship more than 1,000,000 sq. ft. in any week. Deliveries on all orders covering 100,000 sq. ft. or more shall be made at times agreed upon.

PRICE

$19.50 per thousand sq. ft.—loose or Bundled, Standard quarter board.

$19.50 per thousand sq. ft.—loose or Bundled, Standard quarter-board.

Other products, 30% discount from your current published dealer carload delivered price; all prices f. o. b. cars or trucks your plant, Laurel, Miss.

TERMS

Net 25th following month.

Only balance due after crediting purchases made by you under contract of even date shall be paid.

DURATION

One year from the date hereof, and from year to year thereafter, subject to cancellation at any time by either party upon 60 days' prior written notice to the other.

Please indicate your acceptance of this agreement by signing one copy.

Yours very truly,

UNITED STATES GYPSUM COMPANY.

(Signed) O. M. KNODE.

Accepted:

MASONITE CORPORATION.

By (Signed) JAMES P. GILLIES.

368 *Exhibit S–59*

UNITED STATES GYPSUM COMPANY
300 West Adams St.
CHICAGO

MAY 15, 1934.

The MASONITE CORPORATION,
111 West Washington Street, Chicago, Illinois.

GENTLEMEN: We agree to sell to you, and you agree to buy from us, our Willow Insulation Board, subject to the following terms and conditions:

QUANTITY

Such quantities of said product as you may order from us in writing from time to time.

QUALITY

The board to be delivered hereunder shall be of merchantable quality and suitable as an insulating building board and equal to the board of like description which we regularly sell to dealers. When ordered bundled, the board shall be wrapped securely in our standard bundles, six pieces of board to the bundle. No labels or marks of any kind are to be applied to the board or bundles. The size of the board shall be 4 ft. wide by 4—5—6—7—8—8½—9—9½—10 or 12 ft. long, whichever is specified in the particular order.

SERVICE

Board shall be shipped from our plant at Greenville, Mississippi, promptly upon receipt of written order; provided, however, that we will not be required hereunder to ship orders
369 in any one week for more than 100,000 sq. ft. on a ½" basis. The date of delivery for shipment of over 100,000 sq. ft. to be agreed upon. You are to place your orders for quantities of about 200,000 sq. ft. at a time to permit a special mill run and you are to normally give us 10 days advance notice before requiring shipments.

PRICE

½" thickness—$19.50 per thousand sq. ft.—loose.
½" thickness—$19.50 per thousand sq. ft.—bundled.
¾" thickness—$24.00 per thousand sq. ft.—loose.
¾" thickness—$25.50 per thousand sq. ft.—bundled.
1" thickness—$31.00 per thousand sq. ft.—loose.
1" thickness—$33.00 per thousand sq. ft.—bundled.

These prices f. o. b. cars or trucks, our Greenville, Mississippi plant.

TERMS

Net, 25th following month. Only the balance due after crediting amounts of our purchases under contract of even date herewith shall be paid.

DURATION

One year from the date hereof and from year to year thereafter, subject to cancellation at any time by either party upon giving 60 days' prior written notice to the other.

Please indicate your acceptance of this agreement by signing one copy.

Yours very truly,

UNITED STATES GYPSUM COMPANY.
By (Signed) O. M. KNODE, *Vice President.*

Accepted:

MASONITE CORPORATION.
By (Signed) JAMES P. GILLIES,
Vice President.

370 *Exhibit S-62*

In the District Court of the United States, Northern District of Illinois, Eastern Division

Civil Action No. 2842

MASONITE CORPORATION, A CORPORATION, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY, A CORPORATION, DEFENDANT

COMPLAINT

Plaintiff brings this complaint and alleges:

1. Masonite Corporation, the plaintiff, is a corporation organized and existing under and by virtue of the laws of the State of Delaware and has its principal place of business in Chicago, Illinois.

2. United States Gypsum Company, the defendant, is a corporation organized and existing under and by virtue of the laws of the State of Illinois and has its principal place of business at 300 West Adams Street, Chicago, Illinois, within the Northern District of Illinois, Eastern Division.

3. This action arises out of and under the Patent Laws of the United States for infringement of United States Letters
371 Patent Nos. 1,663,505; 1,941,536; 2,120,137 and 2,234,126 by the defendant at or near Greenville, Washington County, Mississippi within the United States District for the

Southern District of Mississippi, Western Division, and elsewhere in the United States, as hereinafter more fully set forth.

4. On March 20, 1928, United States Letters Patent No. 1,663,505 was issued to plaintiff, then having the corporate name of Mason Fibre Company, a corporation of Delaware, as assignee of William H. Mason, for a certain invention in Hard grainless fiber products and process of making same; and the plaintiff is the present owner of the entire right, title, and interest in such Letters Patent with full rights to recover for all past infringement.

5. On January 2, 1934, United States Letters Patent No. 1,941,536, was issued to plaintiff, as assignee of Robert M. Boehm, for a certain invention in Hard vegetable fiber product of high strength and process of making same; and the plaintiff is the present owner of the entire right, title, and interest in such Letters Patent, with full rights to recover for all past infringement.

6. On June 7, 938, United States Letters Patent No. 2,120,137 was issued to plaintiff, as assignee of William H. Mason, for an invention in Process of making lignocellulose fiber products; and the plaintiff is the present owner of the entire right, title, and interest in such Letters Patent, with full rights to recover for all past infringement.

7. On March 4, 1931, United States Letters Patent No. 2,234,126, was issued to plaintiff, as assignee of William H. Mason, for an invention in lignocellulose fiber products; and the plaintiff is the present owner of the entire right, title, and interest in such Letters Patent, with full rights to recover for all past infringement.

372 8. The plaintiff has invested and expended large sums of money and effort in developing and exploiting the inventions of said Letters Patent Nos. 1,663,505, 1,941,536, 2,120,137, and 2,234,126 and each of them, and in making said inventions useful to the public, and said inventions have been and are now of great benefit and advantage to plaintiff and to the public.

9. The public has widely and generally acquiesced in the exclusive rights of plaintiff in said Letters Patent Nos. 1,663,505 and 1,941,536 and the inventions thereof and in the validity of said Letters Patent.

10. The defendant has within the six years last past and still is infringing claim 9 of said Letters Patent No. 1,663,505, and said Letters Patent Nos. 1,941,536, 2,120,137, and 2,234,126 by practicing and causing to be practiced the processes, and by using and selling the products patented by said Letters Patent, without the consent of and to the damage of plaintiff, and will continue to do so unless enjoined by this Court.

Wherefore, plaintiff prays for a preliminary and a final injunction against further infringement by defendant and those controlled by defendant, an accounting for profits and damages, an assessment of costs against defendant and for such other and further relief as the circumstances of the case may require.

BENJAMIN B. SCHNEIDER,
Attorney for Plaintiff,
105 West Adams Street, Chicago, Illinois.
LOUIS QUARLES,
411 E. Mason Street, Milwaukee, Wisconsin.
HERBERT H. DYKE,
551 Fifth Avenue, New York City, N. Y.,
Of Counsel.

373 In United States District Court, Southern District of New York

Civ. 7-498

UNITED STATES OF AMERICA, PLAINTIFF

vs.

MASONITE CORPORATION, CELOTEX CORPORATION, CERTAIN-TEED PRODUCTS CORPORATION, JOHNS-MANVILLE SALES CORPORATION, INSULITE COMPANY, FLINTKOTE COMPANY, NATIONAL GYPSUM COMPANY, WOOD CONVERSION COMPANY, ARMSTRONG CORK COMPANY, AND DANT & RUSSELL, INC., DEFENDANTS

Statement of evidence

Before Hon. ALFRED C. COXE, District Judge.
New York, April 23, 1941, 10.30 o'clock, a. m.

Appearances

Thurman Arnold, Esq., Assistant Attorney General; by Hugh B. Cox, Esq., Samuel S. Isseks, Esq., Special Assistants to the Attorney General; and Marcus A. Hollabaugh, Esq., Robert C. Barnard, Esq., Special Attorneys, of Counsel.

374 Breed, Abbott & Morgan, Esqrs., Attorneys for defendant Masonite Corporation; Charles H. Tuttle, Esq., Thomas E. Kerwin, Esq., Fletcher Lewis, Esq., Louis Quarles, Esq., John M. Coates, Esq., Herbert H. Dyke, Esq., and H. B. Debevoise, Esq., of Counsel.

Cravath, DeGersdorf, Swain & Wood, Esqrs., Attorneys for defendant Celotex Corporation; T. A. Halleran, Esq., and Andrew J. Dallstream, Esq., of Counsel.

Hughes, Richards, Hubbard & Ewing, Esqrs., Attorneys for defendant Certain-Teed Products Co poration; Oscar R. Ewing, Esq., and Taggart Whipple, Esq., of Counsel.

Davis, Polk, Wardwell, Gardiner & Reed, Esqrs., Attorneys for defendant Johns-Manville Sales Corporation; Porter R. Chandler, Esq., and Taggart Whipple, Esq., of Counsel.

Milbank, Tweed & Hope, Esqrs., Attorneys for defendant Insulite Company; Timothy N. Pfeiffer, Esq., William M. Evarts, Esq., and G. S. Sewell, Esq., of Counsel.

375 Sullivan & Cromwell, Esqrs., Attorneys for defendant Flintkote Company; Allen W. Dulles, Esq., and William Piel, Jr., Esq., of Counsel.

Elmer E. Finck, Esq., Attorney for defendant National Gypsum Company; Elmer E. Finck, Esq., and Henry K. Urion, Esq., of Counsel.

Lawrence C. Hull, Jr., Esq., Attorney for defendants Dant & Russell, Inc., and Wood Conversion Company; Lawrence C. Hull, Jr., Esq., and Charles W. Briggs, Esq., of Counsel.

LeBoeuf, Machold & Lamb, Esqrs., Attorneys for defendant Armstrong Cork Co.; Walter F. Kaufman, Esq., Horace R. Lamb, Esq., and Craigh Leonard, Esq., of Counsel.

The COURT. Who is the moving party in this suit? I know nothing whatever about it.

Mr. COX. Sir, the Government is the plaintiff in this case, and we are prepared to go ahead. Now with your permission I should like to make what I hope will be a short opening statement, which will be designed to explain the nature of the

376 case and the issues which the case involves. Before doing that I should like to give your Honor a copy of the bill of complaint, and a copy of a supplemental pleading which the United States has filed in the nature of a reply to the supplemental answer which the defendants have filed. I believe the defendants are prepared to give you a complete set of the pleadings.

Mr. TUTTLE. We have a complete set of our pleadings for the Court, both the original answers and the supplemental answers, together with a copy for the Court of the stipulation of facts which has been executed here. Also a copy of a stipulation which we have executed, relative to the service and filing of these supplemental pleadings on both sides, and I have a copy here of that for the Court. And with the permission of the Court I would like to submit, and I shall furnish Mr. Cox with a copy, first, of a chronology giving the chief dates, which I thought would be of some convenience to the Court, taken from the stipulation of facts and pleadings. It is not controversial

at all; it is merely a statement of dates. And also a shorter memorandum giving the chronology of the principal agreements, in the order in which they were entered into. I will furnish copies of those to Mr. Cox. So if I may through the clerk, I will hand these to your Honor.

The COURT. Just a little light reading over the week end.

Mr. COX. I think, Mr. Tuttle, at this time we may as well put in the original stipulation of facts, together with the book of exhibits, which goes therewith.

Mr. TUTTLE. Yes. Would it be appropriate, before we proceed, if I ask your Honor's permission to move the admission of some counsel from various other States?

The COURT. Very glad to.

Mr. TUTTLE. In the first place, I would like to move the admission of Mr. Quarles of the Milwaukee bar, who is associated with me as counsel for the Masonite Corporation.

377 I would like to move the admission of Mr. Fletcher Lewis of the Chicago bar, who is also counsel with me for the Masonite Corporation.

And Mr. John M. Coates of the Chicago bar, who also is associated with us for the Masonite Corporation.

I would like to move, for the purpose of this case—oh, Mr. Dyke, you are admitted. Mr. Dyke is patent counsel for the Masonite Corporation.

On behalf of two other defendants whose local attorney is not here at the present moment I would like to move the admission of Mr. Elmer E. Finck here, or, rather, introduce him to the Court, because he is a member of the bar.

And Mr. Charles W. Briggs of the Minnesota bar, who is counsel for the Wood Conversion Company.

For the purposes of this case I move the admission of these counsel.

The COURT. Very good.

Mr. TUTTLE. I think there are other defendants whose local counsel will present their own associate counsel from other States.

Mr. LAMB. With your permission I would like to present Walter F. Kaufman, a member of the bar of the Supreme Court of Pennsylvania, who is associated with me as counsel for the Armstrong Cork Company, and ask that he be granted the privilege of this Court for the purpose of this case.

The COURT. Very glad to have him.

Mr. HALLERAN. I move the admission of Andrew Dallsteam of the Illinois bar, a member of the Eastern District Court of Illinois, counsel for the Celotex Corporation, and request the privilege of this Court for the purpose of this case.

Mr. Cox. May it please the Court, before beginning this short opening statement, I should like to hand to the Court
378 a trial brief which we have prepared, which contains what we conceive the facts to be and also states very briefly, without any detailed discussion, the propositions of law on which we rely in this case. Copies of that brief have been given to counsel for the defendants.

This is a proceeding brought under the anti-trust laws to enjoin continuing violations of those laws. The complaint charges that the defendants here have combined to restrain and to monopolize interstate trade and commerce in hardboard. Hardboard is an artificial fiber board made from wood fibres or woody material. For example, it can be made from chips resulting from cutting or can be made from bagasse. Presumably, it can be made from any vegetable fiber, and it is made from fiber as will no doubt be described in the testimony in the course of the trial.

Hardboard is used in the building industry, is used to make floors for decorative panelling, and is also used for forms into which concrete is poured. It is also used for some purposes in other industries, for example, to build toys, and for some uses in the automobile industry.

This case is concerned primarily with the use of hardboard in the building field, although there will be frequent references to the use of hardboard in the industrial field because that also is involved in the case, in at least one rather important respect.

There are a number of other materials, I think I should say at the outset, which are in a way a substitute for hardboard. The stipulation of facts which has been given to your Honor lists a number of those materials. None of those materials, however, is a complete substitute in the sense that it can be used for all or any large number of purposes for which hardboard is capable of being used. For that case, and because of those qualities, hardboard is a product which in our view is of considerable importance
379 in the building industry and we believe it will be of increasing importance in the future.

I think at the outset it is also desirable if I distinguish between hardboard and insulation board, because there is going to be a certain amount of talk about insulation board. Insulation board is also a fiber board but is also a softer board, has less tensile strength and is less resistant to moisture. It is used largely for insulation purposes and therefore is not capable of the same variety of use as hardboard.

The defendants here are ten corporations, all of them being engaged in distributing both hardboard and insulation board. Of

the defendants, only Masonite Corporation manufactures hardboard for distribution in the United States. The other defendants obtain the hardboard which they distribute from Masonite. One of the other defendants, the Insulite Corporation, manufactures hardboard for export to foreign countries but not for sale in the United States.

Aside from Masonite, there is only one company in the United States which manufactures hardboard or a product which possesses substantially the same characteristics, and that is the United States Gypsum Corporation, which is not a defendant in this case. The Masonite Company manufactures upward of 95 per cent of all the hardboard which is sold in the United States.

The issues in this case arise by reason of certain agreements which exist between Masonite and the other nine defendants. Historically speaking, there have been three sets of those agreements. The first set was made between Masonite and the other defendants between 1933 and 1935. The second set of agreements was made in 1936, and the defendants continued to operate under those agreements until the first of this month, when a new set of agreements was executed between Masonite and the other defendants.

380 It is our position that all of these contracts, the three sets, are illegal. We contend that they are illegal for three reasons, or for three general propositions:

First, because they are an arrangement between competitors to fix collusive prices in violation of Section 1 of the Sherman Act.

In the second place, we say that they are illegal because they were made for the purpose and with the effect of permitting the Masonite Corporation to monopolize the manufacture of hardboard in violation of Section 2 of the Sherman Act, and, finally, and this I think is a subordinate part although it is still in the case, we contend that the effect of these agreements is to prevent the other defendants from dealing in materials which compete completely and directly with Masonite's hardboard, with the effect of tying up or preventing competition by the other defendants in this respect, and hence that the agreements violate Section 3 of the Clayton Act.

I think the first two points will be the points upon which most of the controversy in the case will take place.

Before discussing the facts, which is the next thing I would like to do, there is one misapprehension on the part of the defendants which I think it only fair to them that we remove at the outset of this case.

In a preliminary memorandum which Masonite Corporation either has submitted to your Honor, or, I understand, will submit, the statement is made, and I am reading now:

"We understand that a principal purpose of this action is to test the extent to which United States vs. General Electric Company, 272 U. S. 476, still represents the view of the United States Supreme Court as to the rights of a patent holder."

Supreme Court as to the rights of a patent holder."

381 Your Honor, that is not the purpose of this suit. We are not here asking you to overrule any decision of the Supreme Court, and particularly not the decision in the General Electric case. It is our view that on the facts of this case——

The COURT. We will let the Supreme Court do that for themselves.

Mr. Cox. I assumed that would be your Honor's position.

It is our position in this case that that decision has no application to the facts of this case at all, and to the extent that the defendants rely upon that case it is our view that they are asking your Honor to apply the case in an area which lies far beyond the limits which the Supreme Court has defined.

Also I might say that it is not our purpose in this case to test or define in any way the limits of the rights of a patent holder, because it is our view that those issues are not necessarily in this case.

These agreements which we are attacking are not patent license arrangements. They purport to be so-called common law agency agreements.

Now I expect that there will be a certain amount of argument about the patents, but that argument will arise because I apprehend that the defendants in this case will seek to justify their contractual arrangements as a legitimate exercise of a patent privilege. We say that it is not, and we develop that in our brief, so I do not propose to say any more about it at the present time.

Now, I should like to indicate very briefly what we believe the material facts are. Many of these facts are covered in the stipulation which the parties have been able to agree upon and which has been filed with your Honor this morning. That stipulation makes it unnecessary to submit evidence with respect to a great

382 many facts in the case. On the other hand, it does not contain all the facts upon which we shall rely nor, I assume, does it contain all the facts upon which the defendants will rely.

I think it might be confusing in this opening statement if I tried to distinguish as I went along between the facts which are in the stipulation and the facts which we hope to prove by oral testimony, but I think that perhaps I might say this, that a great many of the facts with respect to the history of the industry, the background of the companies, the organization of the companies, the businesses in which they are engaged, the execution of the

documents, and the entry of court orders and things of that kind are covered in the stipulation. On the other hand, the stipulation does not deal in much detail with the history of the negotiations which led to the making of these contracts or with the purpose and intent and motive of the parties in making it, or with the effect of the contracts, and those things I expect will have to be largely developed by oral and documentary testimony at another time.

Now, looking at the facts from our point of view, this story begins in 1926, when Masonite began the production of hardboard. At that time it owned or controlled patents which it claimed covered the process of making hardboard and the product itself.

In 1929, the Celotex Corporation, another defendant here, also began the production of hardboard. It too owned or controlled patents which it claimed covered the process and the product. Celotex and Masonite sold hardboard in competition with each other in interstate commerce. Celotex's prices were lower than those of Masonite.

In 1930, another one of the defendants, The Insulite Corporation, also began the production of hardboard, which it sold in interstate commerce in competition with both Masonite and Celotex.

Beginning in 1930 and continuing from time to time thereafter, Celotex and Masonite had conversations looking to-
383 wards some arrangement which would compose their conflicting patent claims. We believe that we shall be able to prove that these defendants wished to eliminate price competition in the sale of hardboard, and that that wish was the dominating motive in these conversations. Those conversations, however, came to nothing.

In April 1931, Masonite Corporation instituted a suit against Celotex for patent infringement in the United States District Court for the District of Delaware. That Court held that the patent of Masonite had not been infringed by Celotex. The case was appealed to the Circuit Court of Appeals for the Third Circuit, and that Court, with one judge dissenting, held that Masonite's patent was valid and infringed.

Thereafter the Celotex Company filed a petition for writ of certiorari.

After the decision by the Circuit Court of Appeals, the conversations between Masonite and Celotex were resumed. Again there were conversations carried on with a view to some kind of contractual arrangement between the parties. We think here again we can prove that the purpose of those conversations was not so much to compose their patent differences, although that was perhaps the occasion of the conversations, as it was to set up some kind

of a price-fixing arrangement which would eliminate competition in the sale of hardboard.

We believe that the evidence will show that the companies were concerned not only about price competition in the sale of hardboard but also about price competition in the sale of insulation board. On the one hand, there was the fear, we think, that competition in the sale of hardboard might induce price competition in the sale of insulation board. Both companies were interested in that, because they were both producing insulation board.

384 And, furthermore, the opportunity for controlling the price of insulation board through patents was either absent or very much limited, and we believe the evidence will establish that the two companies saw in the patents relating to hardboard the opportunity to extend their price control not only to hardboard but to insulation board as well.

In any event, as a result of those conversations, the parties reached an understanding, and that understanding was embodied in two agreements which were signed on the 10th day of October, 1933. One agreement was described as an agency agreement, and the other was described as a supplemental agreement.

At this time, Celotex was in the hands of receivers, which had been appointed by the District Court for the District of Delaware and ancillary receivers had been appointed for the District Court in Chicago. These contracts were signed by the receivers on behalf of Celotex after they had received authority to do so from the receivership courts.

Thereafter Masonite executed substantially identical agreements with all of the other defendants except two, which came into the picture at a later date. All of those companies were engaged in either producing and selling or in selling insulation board.

The arrangement which was made with Insulite I think is particularly significant. In 1934, Masonite had sued a customer of Insulite for patent infringement, a customer who had bought hardboard from Insulite. As a part of this arrangement, that suit was dismissed, although issue had never been joined. From that time on Insulite gave up the manufacture of hardboard except for the limited extent that it made hardboard, under its agreement with Masonite, for export to foreign countries.

The agreements which were made with all the defendants are, as I have said before, identical in form except for certain minor deviations which I think are of no consequence and contain

385 the essential points, and I think I will summarize them now rather than wait until later and because, although the form of this arrangement has varied from time to time, we think it has essentially remained the same.

This is what the agreements say:

The other defendants agreed to take all their requirements of hardboard from Masonite. The agreements purported to establish the other defendants as agents for Masonite to distribute their hardboard. The other defendants were required to adhere to prices, terms and conditions of sale which Masonite fixed, and finally, and this I suggest, sir, is quite an important point, Masonite, was understood, in turn, it would itself adhere to the same prices, terms and conditions of sale which it fixed for its agents. The effect of these agreements was obviously to eliminate price competition in the sale of hardboard. Furthermore, we suggest the effect was to cause the defendants who were manufacturing or trying to manufacture hardboard to cease their attempt altogether.

I may say, in passing, the agreement also contains provisions which were designed to prevent the other defendants from selling hardboard for industrial uses as distinguished from use in the building trade. We believe we can prove common knowledge on the part of all the defendants of all these agreeements and we think the supplemental agreements bear evidence that there was common knowledge of their arrangements. They continued to operate under those agreements until 1936, when a new set of so-called agency agreements was executed by the same group. These contracts likewise were subject to mutual discussion among all the defendants. They were executed on different dates, but they all became effective on the same date. The nature of the arrangement was left substantially unchanged by these new agreements.

386 It appears from the evidence which we have that the one reason for making these new agreements was because the defendants wished to tighten their control of the price situation. It appears, for example, after the execution of the first set of contracts, certain competitive practices had grown up in the sale of hardboard which the defendants found distasteful. One of these practices was this: since the agents could not cut or deviate from the prices of hardboard as fixed by Masonite, they adopted the practice of competing for the sale of this commodity by including with it insulation board, and selling it with the hardboard, so that the purchaser got a combined lot of insulation board and hardboard at a somewhat lower price than if the sale had adhered to the established or going prices for insulation board.

Provisions were put in the 1936 agreement which were designed to stop this practice. The defendants continued to operate under these agreements until the first of this month. In February of this year this case was set down to be assigned for trial on April 14th. On the 26th of March the defendants, through their counsel, notified the Department of Justice that they were considering the execution of a new set of contracts and they asked the Department

for an expression of its views as to the propriety of the action. A substantially accurate account of what happened at that conference I think is set forth in Mr. Tuttle's supplemental answer on behalf of the Masonite Corporation. I think, in brief, what happened was this: we said it was not our policy to expr[illegible] views as to arrangements of that kind, particularly during the pendency of litigation. Of course they had the right on their own responsibility to make any arrangements which were consistent with law. After examining the agreement, however, we indicated to them that we did not believe that the new agreement would provide any basis for the discontinuance of this suit either by the
387 dismissal of the bill or in any other way. Thereafter we filed a supplemental pleading in the nature of a reply to the supplemental answer which the defendants filed, which set out the nature of the new arrangement which they made. These new agreements were actually executed on the first of this month, although they were dated as of March 20th.

These new agreements differ from the 1936 agreement in a number of rather important respects. I shall refer to those differences in a moment. We believe that these changes are tantamount to an admission by the defendants that their previous arrangements were illegal, but despite the changes the inherent illegality of the arrangement remains unchanged.

Masonite still fixes prices, terms and conditions of sale to the other defendants, which still, in our view, is part of the understanding that Masonite itself will adhere to those same prices, terms and conditions of sale. It is still our view that one purpose and effect of the agreement is to keep the other defendants from manufacturing hardboard and to preserve the industrial market as Masonite's exclusive market.

So much for a summary of what we regard as the important facts. I have not attempted to develop them in great detail or amplify them in certain respects, as that doubtless will be done in the course of the testimony. I think that statement should, at least I hope, give your Honor some idea of the transactions which are involved in this case.

I now propose to state very briefly the propositions of law upon which we rely. I do not want to attempt to discuss or argue these propositions which it seems to me might better be reserved for a more appropriate time. At the same time, the discussion in the trial brief is in little more detail, if your Honor wishes to examine it.

Before stating anything about the propositions of law
388 relative to the case, I should like to say a word concerning our proof. It is our position that we are entitled to introduce evidence with respect to the history and background of the

industry, and particularly with respect to the past transactions and conduct of the defendants. All the evidence which bears on this aspect of the case has been included in the statement of the defendants, but a great part of the oral testimony will relate to the same subject matter. I don't know what position the defendants will take on this point. It may be that they will argue that this case should be considered on the basis of the agreements which were made the first of this month and to detach from all consideration what has gone before.

We submit that this contention is unsound. It is our position that the new contracts are merely a continuation of the old combination and conspiracy, and we suggest with great earnestness that that contention can only be weighed and should be weighed in the light of the past conduct and transactions of the defendants, particularly as those transactions throw light upon their motives and upon the intent which lies behind this arrangement.

The cases which we rely upon to sustain that position are cited in the trial brief, and I don't propose now to say anything more about it.

Now for our contentions on the law so far as they relate to the merits, we believe that the defense of the defendants, and their entire defense, rests on the decision of the Supreme Court in the General Electric case. As I said before, it is our position that that decision does not apply here. We contend, in the first place, that the arrangement here, unlike the arrangement in the General Electric case, is an agreement among competitors to fix collusive prices. In the General Electric case, the agents which General Electric appointed, and whose prices it controlled, were in no substantial case in competition with the General Electric
389 Company at all. In other words, what was done there was to establish a kind of vertical distribution system in which General Electric controlled the prices at which its agents sold. In this case we say we have a horizontal combination between competitors to fix non-competitive prices.

In the second place, we point out that in the General Electric case there was nothing in the record to show that the General Electric Company had agreed itself to adhere to the prices and terms and conditions of sale which it fixed for its agents. In fact, there was no reason why it should. It was not, as I have said before, really in competition with those agents.

I should perhaps say, although I have no doubt it is probably unnecessary, that there were two branches of that General Electric decision, as your Honor doubtless recalls—one which upheld the validity of the arrangement between General Electric and its distributing agents, and the other branch of the case upheld a patent license agreement between General Electric and West-

inghouse. It is our view that that second branch is not involved here at all, because these agreements are not patent license agreements. While I don't know whether the defendants will attempt to rely upon that part of the General Electric case, it is my present impression that their chief reliance is based upon the agency point and not upon the patent license agreements.

If we are correct in our view of the General Electric case, it makes no difference whether they are true agency arrangements or not, because even if they are true agency arrangements we submit that they would be illegal because there is no magic attached to agency agreements. If it is illegal because it is made between competitors and fixes collusive prices, then it is illegal even though it is an agency contract. But even if
390 the defendants are to prevail under the General Electric case, they must establish that these contracts are bona fide agency contracts.

Now we have a second and alternative position as to that. We say that in fact these contracts are not really agency contracts. As to the contracts in 1933 and 1936, we think the weight of our contention is overwhelming. Indeed, we think, as I have said, that the defendants have admitted that they themselves did not believe that those contracts would stand the scrutiny of litigation, because their conduct in changing them on the eve of this trial could be explained in our view and in no other way.

As to the 1941 agreements, those that were made three weeks ago, we contend that they are not in fact true agency agreements. I may as well admit that when they made those contracts they changed a number of the provisions of the old agreements so as to shift certain incidents and burdens from the agents to Masonite in a way which makes the new contract look a great deal more like an agency agreement than the old ones looked. Nevertheless, we suggest that when that contract is examined carefully and its terms and conditions are examined, and above all when we look at the position of these defendants in the industry, ten large companies not primarily engaged in distribution of hardboard products considered by itself as were the agents in the General Electric case, but many of them engaged in manufacture, and all of them engaged in distributing a large number of commodities on a large scale. We say when you look at these defendants, the notion that they are acting in any real sense as agents for Masonite is at most a legal fiction. The only way in which they act as agents is when they adhere to these prices which Masonite fixes. In other words, it is an agency arrangement only insofar as it accomplishes the purposes which we say are illegal under the Anti-Trust Law.

Finally, we contend that the effect of these arrange-
391 ments has been to permit Masonite to monopolize the manufacture of hardboard, in violation of Section 2 of the Sherman Act. Now on that branch of the case I expect that we will be met with the defense that Masonite's position is the result of its ownership of patents. No doubt Masonite owns patents which are of considerable value, but we contend, and we think the evidence will show, that its present position of dominance is not the result of its patents alone; that it has achieved that position not so much by a legitimate and conventional exercise of its patent rights as it has by these collateral arrangements, these so-called agency agreements which are not patent license agreements at all.

We are perfectly prepared to permit Masonite, as indeed we must—we have no choice—to exercise any monopoly or any privilege which its ownership of patents gives it. But we suggest it should be left to the protection of its patents alone, and it should not be permitted to extend, strengthen, and increase that position by the use of these collateral arrangements.

Finally—and this is really the last point—I shall urge with great earnestness that in view of the past history of these defendants, their transactions and their conduct, that the only effective relief which the Government can get in this case is a decree which cancels the contracts made on the 1st of April of this year, and enjoins the defendants from executing any similar contracts. We suggest with great earnestness that if that is not done no measure short of that will achieve our purpose of restoring a free competitive market in this industry.

Defendant's opening

Mr. TUTTLE. May it please the Court, while I am acting in this trial only for the Masonite Corporation, it has been agreed among counsel for the defense that in the interest of brevity I
392 should make an opening statement sufficiently comprehensive to set forth the views which the defense entertains concerning this case, both from the point of view of law and from the point of view of fact, leaving to counsel for the respective defendants to add, if your Honor permits and they wish, any additional comment concerning their own particular client's position.

I think that this trial should start with a thorough understanding of the use of the term "hardboard." I emphasize that because I consider much of the charge and its extent as presented by the Government as due to a confusion and a looseness in the use of this term "hardboard." Hardboard of course, if we use "hard" merely as an adjective, could refer to most any-

thing, even in the natural wood of the harder varieties. But hardboard as it is used here is employed as one word. The adjective and the noun are run together, and it is so run together, even in this complaint, because it is an artificial term used by us for many years as the manufacturer to designate a particular product made under a particular patent, the validity of which has been adjudicated. And that term, uniting the adjective and the noun artificially, has long been understood in the industry, the building industry generally, as designating this product made by us. If you separate the adjective from the noun of course you secure a loose designation which would be descriptive grammatically—in the dictionary sense—of many things. And I want to emphasize that this patent relates only to a particular process, the manufacture of a board of cohesion and strength which rests upon the special method of manufacture used, of materials which are referred to in this adjudicated patent. We don't claim that others cannot produce a board which has a degree of hardness without infringing this patent, and the Government will not claim that we have at any time made any agreements with anyone by which boards of a degree of hardness and not produced according to the peculiar features of our patent, which I will describe in a moment, have been restricted by
393 us from the point of view of manufacture or commercializing in any degree whatever.

Our agreements relate to hardboard (one word), hardboard which is the outer and visible expression of our patent, and we of the defense will do our best not to permit the Government to slide away easily from this patent conception of this particular product.

Let me emphasize also that we are not, and are not charged with being, a patent pool. We are the inventor. We are the inventor, incorporated, of the 50 patents that are in this case and which center about hardboard as used in the sense I have indicated. 41 of them were the personal invention of William H. Mason, from whose name we derive our corporate name. Of the remaining 9, Mr. Mason was joint inventor. A number of the employees of the company, of his, were inventors. I believe there are only 4 of the entire list of 50 which were not the personal invention of Mr. Mason, singly, or jointly with others, or on the part of the employees.

I said this patent had been adjudicated. Your Honor will find this adjudication is 66 Fed. (2d), C. C. A., and there the patent is described, and its originality is defined. The originality of that patent lies in its use of the binder in natural wood provided by nature. Natural wood consists, among other things, of a certain amount of fiber. The fibers are about 1/25th of an

inch in length. They are hollow tubes. Nature provides as a protection for those fibers, as a cohesive force to hold the substance of the tube together and then in addition to hold the tubes together in a mass, a chemical substance known as lignins. Now lignins is the base and heart of this patent, and it was so held by the Circuit Court of Appeals.

This patent is a process by which an artificial board is created through the preservation of this natural binder as
394 a binder. Now there may be all kinds, and there are all kinds of artificial boards which use other things as a binder.

The introduction chemically of artificial products, or of extraneous products that are not part of the natural wood, and no doubt in the course of this case there will be references to the possibilities of making artificial wood more or less hard by introducing other means of binder so as to hold the cellulose and fibers together.

But what has made hardboard, our hardboard, go commercially is that by the preservation of the natural binder we have accomplished for our product certain very desirable qualities which I will allude to later, and which are not in the same degree and over the same range possessed by artificial boards made with other binders.

Now, in our stipulation of facts here, at page 9, and I shall briefly call attention to it, we have set forth by agreement with the Government that this resulting product which is made, according to the process we mainly use, by introducing into a large cylinder called a gun, chips of natural wood and live steam under very great pressure. That pressure is suddenly removed after the steam has had time enough to penetrate the chips of wood. The sudden removal of that great pressure results in an explosive or disintegrating effect upon the fibers in the wood. At the same time it does not destroy these lignins. Disintegration of natural wood can be accomplished by certain chemicals, of course, will result in disintegration, in turn, of chemical change of the lignins. The result is you will have a different product, if you have any product at all, than the one we have.

Then that mass which comes out of these guns is then treated either according to what is called a wet lap process or a dry lap process. A wet lap process, of course, presupposes in
395 this mass the retention of a certain amount of moisture, to a considerable degree, and that wet lap is then subjected to predetermined degrees of heat and, simultaneously, of pressure—great pressure. The result is that an artificial board of very considerable hardness, without grain, of great durability, of resistance to moisture is obtained in various degrees of thickness

and of hardness, according to the pressure that is placed upon it. The dry lap process is similar, except that the degrees of heat and pressure, there being no moisture, is somewhat stepped up to produce the result.

Now, this stipulation of facts says that the resultant products, and by that is meant we have boards in various degrees of thickness and of some difference of degree of density—the resultant products are the homogeneous, hard, dense, grainless fiber hardboard, it has high tensile and breaking strength when either dry or wet, and low water absorption.

Now I want particularly to emphasize the next sentence: The term "hardboard" is widely understood as referring to the product manufactured by Masonite and is generally used as designating a fiber board product with a weight from approximately 30 to 60 pounds, and so forth. In other words, we must use this term in association with the idea of the destruction of lignins. That is our patent. That is our business in hardboard. That is the kind of hardboard we deal in, and we alone. We make no agreements which affect the manufacture or production of any other kind of board, hard or otherwise. We are not involved in patents in connection with any such other kind of board.

Now, the competition that we experience is enormous and is not restrained in the slightest degree.

I need not present at length to your Honor the thought that artificial boards are legion. They are made by many of these other defendants. They are made by other concerns.

396 Reference has been made by counsel to insulation board. Insulation board is a much softer board and its objective and functions are chiefly, as the name indicates, to accomplish a certain amount of insulation against sound, heat and cold. Our board does not have those qualities. Nevertheless, there would be inevitably a certain amount of competition between one artificial board and another for flooring, for walls, for ceiling and for a great variety of structural and manufacturing purposes. And that is referred to in paragraph 19, of which I would like to read a sentence or two:

"Hardboard"—that is our product, "is used in the building industry as wall board, for decorative paneling, for exterior covering, for waterproof paneling in kitchen and bathrooms, for flooring and subflooring, for ceilings, and for forms into which concrete is poured. In addition, hardboard has found a constantly increasing number of uses in other industries, as, for example, in the furniture, toy, advertising, pleasure boat, automobile, and movie industries.

"There are other materials which can be used in some cases as substitutes for hardboard,"

and then follows a long list of them which you will find at the appendices or exhibits to this stipulation of facts, list of the products of a competitive character manufactured by many of its agents, these other defendants, or distributed by them, if not manufacture.

The stipulation further says:

"No one of these commodities is fully capable of being put to all of the uses for which hardboard in its various forms is suitable."

Then I want to emphasize this sentence:

397 "The amount in money of the retail sales of hardboard by retail building material dealers is estimated to be substantially less than one percent of the amount in money of sales of building materials by retail building material dealers as reported in the Preliminary Summary of the 1939 Census of Retail Trade." (Governmental census.)

I say that when the Government refers in its complaint here and in its opening to monopoly, we must understand that there is no such thing; there can be no such thing as a monopoly on artificial board in our hands. We have under our patent a right to a monopoly on the particular product which the patent covers, but outside of that we have no monopoly and have not attempted in any form, shape, or degree, to influence the commercial market.

Now, the issues. There are two sets of pleadings placed before your Honor. One is the original set of complaints and answers by the various defendants. In that answer of ours, we have endeavored to be entirely frank as well as in this present stipulation of facts. The supplementary set of pleadings relates to those agreements made last March to which counsel alludes and I will come back to that.

The stipulation of facts is extremely comprehensive. We have wished to cooperate with every degree possible with the Government in the presentation of this matter as well as in the conduct of our business, as I will show in a moment. That stipulation is in three parts: waiver of common law proof as to documents, etc. not in dispute, reservation of objections, of course, and then extended narrative.

Now it is true, as Mr. Cox has said, that we have cited heretofore and relied in connection with the issues of this case on the law side, the General Electric Company case. I may perhaps be allowed to say, that the preliminary memorandum which

398 I handed to Judge Goddard, a copy of which I gave Mr. Cox at the time, was not an exaggeration or inadvertence, but does faithfully present certain statements made by certain representatives of the anti-trust people. If counsel now say it is not their purpose expressly at least to secure an overruling of

the General Electric case, or place such limitation upon it as to leave it no longer effective, then of course we will accept their statement.

We also rely on a very recent decision by the Federal Court, General Electric Co. v. Willys Carbide Tool Co., 33 Fed., Supplement 969. That was a decision on July 17, 1940, and it does two things: first, it holds that the General Electric Co. case, 217 U. S. is as broad still and as protective of patent rights as it was the day it was rendered, and it applies that decision to a set of facts which are peculiarly identical with the present case and upholds the legality of the action of the patent holder and of the distributional agents employed by it.

Now as I have said, this patent was adjudicated to be valid under the following circumstances: the Celotex Company which is a very large national distributor of building materials, set out to make a hard panel board—various names were used but they are not important—by utilizing the natural fiber and the lignin used as a binder, from sugar cane fiber. Our patent claim covered wood and woody material and their claim was that they were not infringing because they said that sugar cane was neither wood nor a woody material, and therefore they could utilize our idea of using in connection with the natural fiber the natural binder, without infringing. That case came on for trial—an infringement case which we prosecuted before Judge Nields in Delaware in 1932.

We encountered a decision by Judge Nields in the latter part of 1932—the case, I think, started in 1931,—which held that
399 our patent was perfectly valid; that it was true invention and it had priority, but he said that the sugar cane was not wood or woody material.

On that limited issue, the situation went to the Circuit Court of Appeals as Mr. Cox has said, and Judge Nields' view was reversed, the opinion being written by Judge Woolley. That opinion held that this material which Celotex was using was woody material, and inasmuch as they were using for preservation a binder of lignin, they were infringing the perfectly valid patent which had priority. I need not emphasize the fact that the litigation was an extremely bitter one. There was no collusion about that litigation, and I don't believe that the Government will contend for a moment that there was.

The Celotex Company filed a petition for certiorari in the Supreme Court of the United States. Now, I say the Celotex Company, but that requires me to qualify the expression somewhat for this reason: in the course of this litigation and while it was still in Judge Nields' court, the Celotex Company went into the

hands of a receiver appointed by Judge Nields in Delaware, and an ancillary receivership in the Northern District of Illinois by the Federal Court—Judge Wilkerson. An order was promptly entered by Judge Nields, placing the defense of all litigation including this infringement suit brought by us in the hands of receivers, so at the time when Judge Nields rendered his decision, and when these appellate court actions were invoked, it was the receivers and not the Celotex Company that were our opponents, and your Honor will see from the briefs when we come to them, in the Circuit Court of Appeals and in the petition for certiorari in the Supreme Court, that the activating parties are the receivers.

It is not necessary to dwell upon the speculative character of whether or not the Supreme Court of the United States would have entertained a writ of certiorari on a subject matter which involved no general rule of law, but simply on a question of some special or particularized question as to whether sugar cane was a woody material, or whether it would even entertain a writ of certiorari and if so, whether it would have been reversed. Those are speculative matters. In that situation we find that the receivers were confronted with a prospective mandate of the Supreme Court which would not only enjoin but would hold accountability of profits and damages—a very serious judgment was about to come down against the receivers and the assets which they represented, and as I say, they had merely a purely speculative proceeding in the Supreme Court of the United States.

Thereupon, these receivers, representing the Court, entered into negotiations with the Masonite Company. Their objective, of course, was to avoid the consequences—at least that was one of their objectives—to avoid the heavy judgment with which they were threatened, and an agreement was worked out and signed on October 10, 1933.

Now, your Honor, that date is according to this complaint by the Government, the date of birth of this conspiracy, because you will find in paragraph 37 directly under the head of "Formation and continuance of the conspiracy," these words: "On October 10, 1933, defendants Masonite and Celotex entered into a conspiracy unlawfully"—etc. The Government is very exact about the date of the commencement of that conspiracy. It is not even "on or about," but is on that date, the date of the signing by the court's receivers of this agreement, the Masonite Corporation, while the receivers signed, in fact the court signed; both Federal courts signed, because the receivers were acting under the jurisdiction of the court and pursuant to the practice of the court, it laid before both courts, the ancillary receiver in Chicago and the two principal receivers in Delaware—laid before both courts the agreement

which they had worked out and asked for an approval thereof.

401 So it is pretty difficult to escape the idea that this complaint, in saying that this agreement was made between Masonite and Celotex, has lost sight of the realities of the situation, and a point where it might be very misleading. That was not the agreement. The agreement was made between two courts expressing themselves in respective orders on October 10th and on October 12th, that this agreement should be signed, and one of those courts, may I emphasize, is the very court which knew all about this business, because it had had the patent litigation before it, and if Judge Nields, who had been reversed, felt that with his background and knowledge of this situation that there was much of a chance that the petition for a writ of certiorari filed by his own recejvers in the Supreme Court would succeed, it lay in his power that that be done rather than that this compromise and settlement should be worked out.

Now that agreement deserves some very little brief mention by me now, because there came long afterwards other national distributors who asked for the same privilege, and let it be noted that instead of trying to prevent anybody getting in on the same basis and taking the same relationship with us as had Celotex, we permitted them to do so, and that has been our attitude as regards those who could render like services to us.

Now that agreement is set forth in an agreement known to the Government for a long time along with the other agreements which were filed with the Federal Securities and Exchange Commission. In the first place, it was an agency agreement and so denominated. You will see that this was the situation at that time. The Celotex estate was confronted with the dangers of a very large judgment; on the other hand, the Masonite Corporation was struggling with a situation resulting from lack of capital. They had invested their resources in developing the invention, in building the plant and in attempting to get distributional

402 facilities, but their resources for the latter were slight. This will be more emphasized in the testimony. If distributional facilities could be secured on a nation-wide character, there would then be a lightening of the burden of procuring the capital to secure that distribution ourselves. It was really a business proposition, and we felt that Celotex, which had been in the business of distribution on a nation-wide business basis for years for all kinds of building materials, with innumerable contacts built up on goodwill and long relationships, contacts with architects, contacts with dealers, contacts with jobbers and wholesalers who would undertake to add our product to its many lines, that by that means we would be relieved of a huge cost, which would

have to be secured by advertisements, setting up of sales agents and making of innumerable contacts all over the country, but thereby we would have saved that cost. So those were the considerations operating on both sides. There was nothing concerning conspiracy, nothing concerning the violation of any law whatever, but on the contrary it was all done with the approval of the court. It was not exclusive. We could have entered into such relations with anybody. We could do the same things ourselves. It was simply a provision that we would be fair to them, in other words, we would sell at the same price as our agents sold, and they would be fair to us by selling at the same price that we sold it. In that field of sale, it was permitted to have the price fixed by the dealer lists we had.

I need not remind your Honor, whether the General Electric Company case is the law or not, a patent holder has the right to fix the price whether he sells through himself or through an agent. In addition, that agreement limited this agency to selling along the lines that it was distributing other materials, in other words,
103 to the building trades. For reasons which I will refer to a little later, we reserved to ourselves what I think is rather erroneously referred to as the industrial field, but is simply really the manufacturing field. It was under an agreement, according to the old common law term, the agent, not we, knew the credit standing of the customers, consequently we would be paid by the agent within a certain period of time after the transaction. There were no restrictions on other products. The compensation by way of commissions to the agent was, as we expect to show you, was less, after the various considerations that he would have to make, was much less than we would have had to extend if we sought to take over his distributional facilities ourselves, and that statement is based on our experience in such matters.

Now, as to preserving to ourselves the industrial field, so-called. Just a word of explanation as to that, because this term "industrial" will constantly appear in the case.

When we started to make this hardboard and to grade it, a very large percentage of the product was subgrade or substandard. This was made in presses which produced boards 4 feet wide and 12 feet long. It is true we might have had presses which would have made different lengths, but that would have been very expensive, so we made the board in presses of that size, and at first, the early years, there was much that was subgrade or substandard.

It would never do to pass this substandard material into the hands of others for sale beyond our control, because no matter what agreements you may make on the subject, it would certainly get out. We felt that we had to continue in ourselves complete control and to accept the full responsibility for the use of sub-

grade or substandard boards, and while that percentage has been very much reduced at the present time, there is still, of course, a limited quantity which comes of a substandard grade.

404 Now, those substandard boards could be sold not in the building industry, because there they need boards of very considerable length. But they could be sold to manufacturers of various products, like toys and so forth, that need material only in small sizes and cut it up in small sizes, and in consequence there was this differentiation between the building trade on the one side and the manufacturing or constructional trade of the character I have just indicated on the other. Furthermore, these toy manufacturers or others who desired to have very small pieces in order to insert into the structure they were building for commercial purposes, sometimes desired the product made specially, and as we were the sole maker we had, of course, to keep control of the making.

Now that is the reason for that differentiation. The Government attempts to make a lot of it. They say we did not give the full privilege and sale to the agents, but limited them to this perfectly enormous field in which we occupy only 1 per cent.

Next I would mention what my friend Mr. Cox mentioned, the ensuing agreements. We felt that we should treat other national distributors on the same basis, and they came along with their requests from time to time. I shall not take up the details now, beginning in the latter part of 1933 and running all the way down to 1937. I have given your Honor a chonology of those agreements with the initial dates.

Reference has been made to The Insulite Company. The Insulite Company began in the early '30s, I think, to make a board, preserving these lignins, this natural binder. They did not have even the benefit of the possibilities of the Celotex Company in the use of sugarcane.

They took the natural wood and lignins, and in 1934 we started an infringement suit against the Faxon Lumber Company,

405 which was a customer of the Insulite Company, which, in turn, was a wholly owned subsidiary of the Minnesota & Ontario Paper Company, which in turn was in the hands of the Federal Court through equity receivers, and subsequently through 77B proceedings. That court was Judge Molyneaux's court, and, again, we having started suit and it being perfectly plain we having started that suit in the same Circuit that had rendered the decision in our favor in the Celotex case, and it being perfectly plain that Insulite Company was in a worse position than was the Celotex Company to succeed in any such infringement suit, an agreement was authorized by the court. The details of that will be gone into. But, again, it is the court that authorized the

agreement. And in that case there were privileges extended to them to fulfil their existing commitments on a press which they had, which press we in turn bought under an agreement we would sell it back at the end of the period of this agreement to them, and then they could at the termination of that agreement manufacture on that press products of a different character, and in the meanwhile we were to buy from them and did buy from them what was called their light-colored insulation board, which light-colored insulation board of course is not our hardboard at all. But you can see that where these distributors have a distributional system it helps them in their business to have a variety of articles in the building field, instead of confining themselves to a few. It helps them to have a line. It helps them with their freight, because they can supply their dealers with a diversity of products by sending that diversity in one carload or carlot to the dealer. It helps them in their contacts with architects, with owners, with builders, to be able to lay before the building field a choice in themselves.

Now that was the disposition of that suit, and I think the Federal Court was again entirely right in believing it was a proper compromise.

406 The COURT. We might take a recess for a few moments.

(Short recess.)

Counsel for the Government has referred to the company known as the United States Gypsum Company and has said that that was the only other manufacturer of hardboard. There again the accuracy of that statement, of course, turns on the definition of the word "hardboard." What happened there was that in the early '30s they started making what they called a hard panel board, and filed various statements in the Patent Office. They too were a large distributor of building materials on a nation-wide basis. We immediately instituted interference proceedings on the ground that their process and product was an interference and infringement of our patent. They were using the dry lap process. Otherwise they were duplicating the whole idea of natural wood plus the preservation of the lignin, but it was their contention that the dry lap process was a variation which entitled them to manufacture on that process and yet not infringe.

The Patent Office decided in our favor. That particular matter then did not immediately go to the court. But they sent word that they were going to adopt a different process, and we spent several years in trying to find out, without success at once, the process which they were utilizing for their so-called hard panel board, which hadn't any of the characteristics of our hardboard and, in our judgment, would require a method of production which would be an infringement. Finally securing other information on

the subject which strengthened our belief that it was being manufactured under a method which directly infringed, we have instituted and there is pending an infringement suit against the United States Gypsum Company in the Northern District of Illinois.

407 Reference has been made by Mr. Cox to the agreement of last March, which may be referred to here, I suppose, as the "new agreement." It took effect on March 20, 1941.

Mr. Cox has shown me the compliment of saying that I have in my answer fairly set forth the representations which we made concerning it to the department in Washington.

Masonite Company is, like these other companies, engaged these days in furnishing materials useful for the National Defense Program and required by the Government. We are furnishing, for example, an immense quantity of hardboard to the Government for structural purposes in various ways. The last thing we wanted then and the last thing we want now is a controversy with the Government. We want to avoid, if possible, challenges, wherever it can be done, particularly challenges in connection with such an uncertain field and indefinite field of controversy as the Sherman Law. So in this answer we said, and truly:

"The defendant and each of the other defendants have a long time been desirous of complying with the law, in conducting its business in accordance with the statute of the United States, and it believes they have done so at all times. This defendant, however, is aware and alleges that there are and have been divergent opinions as to the proper construction, interpretation and application of the statutes, and particularly the anti-trust statutes. The aforesaid new agreement has been made for the purpose of placing the conduct of the hardboard business by the Masonite Corporation and all its media of distribution beyond the possibility of even plausible criticism under the anti-trust statutes and yet preserve its business according to the rights of this defendant and in the interest of the building and construction industry of the United States and the American public."

408 So that we worked out this new agreement, a committee of which I was a member presented it to Mr. Cox, and through Mr. Cox to Mr. Arnold, and said that it was not any hard and fast thing. It was our conception of expressions which would avoid even the criticisms which they were attempting to make of the former agreement, and our assurance that the last thing that we wished was controversy, and that we would be glad to be guided, and that still holds true. We asked for suggestions. I can understand the policy of the Department which we immediately encountered, which was to the effect that they would

give us no expression of opinion in advance, we had the right to make any agreement which the law would allow for the conduct of our business, but we should have to do so on our own responsibility. It was a bit of a negation, and it certainly was a dash of very cold water, because we wanted to work this thing out.

The new agreement was thereupon made, and we served it upon the Government in the form of an exhibit attached to a supplemental answer from which I have read, and the Government has put in a reply to that supplemental answer, in which they do two things. In the first place, they challenge the new agreement as equally illegal, or as, at least, part of the old alleged conspiracy. And, second, they ask for judgment to that effect. In other words, they ask your Honor to render a judgment that this new agreement is invalid and illegal and accomplishes nothing upon which this business of hardboard can be carried forward lawfully. We do take issue with them on that. This was prepared, as I say, by many counsel who expressed to each of their respective clients the assurance of responsible counsel that the agreement was in all respects valid, and we tendered it to the Government for its judgment.

409 Now we, too, ask for judgment, and we feel that if such judgment as that is pronounced in our favor, as we believe it should be, that it obviates, for obvious reasons, consideration of what from certain points of view may be regarded as ancient history from that moment on. A court of equity, I assume, particularly these days in dealing with industries, looks for constructive results wherever possible, rather than destructive results, negative results; and this is an effort on our part to reach a constructive result through the Government and through the Court.

Now that agreement in the first place cancels all the prior agreements. In our answer we express our assurance that we have no intent to revive those prior agreements. We stand on this new agreement, and it is exclusive of anything that has gone before. There are in one or two instances supplemental agreements made in order to deal with special situations, as, for example, the judgment of infringement and the consequences thereof entered against the Celotex receivers. But they are of no importance in connection with the main subject matter. We have removed the del credere feature, which was the subject of considerable criticism in this complaint, to a large degree. We have removed to a large degree the expiration of the agreement, subject to certain provisions perhaps too detailed to go into, generally setting March 20, 1945, which is the date of expiration of our basic patent. In other words, we have not attempted by this agreement to project ourselves necessarily and irrevocably beyond the date of the ex-

piration of the patent, which is on a consignment basis, a pure consignment basis so far as these agents are concerned, and yet at the same time orders may be placed by them for customers for delivery directly from the plant.

The burdens are divided between the Masonite Corporation and the agents, in the natural order. Out of the commis-
410 sions which the agents are to get they will defray the natural expenses which would fall to them in the handling of this product after in the process of delivering to them, and in their subsequent handling of the product, and we defray the expenses which would naturally fall on the owner of the product. The classes of buyers to which they may sell are not different in the main, speaking broadly, from what I have already described. These are agents for the building industry. We still do, to a somewhat more limited degree, but we still preserve to ourselves the matter of dealing with the industrial field using that term in the sense that I have described.

Now in closing, what is the result of this business? In the first place, we have conferred upon the public and on the United States an invented product which has degrees of excellence and public service which is being universally recognized, and carries on on its merits. Our hardboard is not just another artificial board, of which there are legion. It is a product with peculiar excellence, and serves a public purpose. The country is the better off for the arising of this industry. Furthermore, it is a cheap product. It is in the cheap field. This is not a luxury product. It serves those who are looking for low costs, and in consequence it is in an enormously competitive field because competition in luxury products is far less than on the cheap level.

As to prices, we intend to show your Honor an unusual thing. I know you can take judicial notice, almost, that during the last few years costs of materials, particularly in the building field, cost of lumber has greatly risen. The cost of all our raw products has greatly risen. And we will show you the percentages. In addition, we employ 2,000 employees in our plant at Laurel, Mississippi. We pay them the highest prevailing wage paid in the entire State of Mississippi in the building field—building
411 construction material field—and that cost for labor has gone up steadily. On the other hand our prices have, taking them by and large—we have a various number of products, and there has been some variation between one product and another—by and large declined, certainly relatively.

How has that been accomplished with a scale of prices which certainly was not rising and in some degree lowering, with costs both on the human side and on the material side steadily and greatly rising? It has been accomplished for the benefit of the

public through two factors—one, through the excellence of management, of course, and in the second place, it has been accomplished through these very agreements which are now attacked, and which, if set aside, would entirely reverse the picture. These agreements enable us to get mass distribution, which otherwise we could not get, and by the elimination of mass distribution we could not produce at an economic profit as against these other factors of the price level which has been maintained, and rising cost of material, labor and distributional costs.

So that we have this practical consideration, sir. Without arguing it all at the present time, I just want to emphasize—because we will present it before you—that these agreements have the effect of keeping the price down. Secondly, of promoting competition, as we compete with our own agents, our salesmen go to the same dealers, same contacts wherever they can. The agents compete against each other in a way which we will describe in these very products, and of course in many others. And, in addition, we are able through these agreements to pay a better rate of wage than we could otherwise pay, and to serve the public by a wide distribution of this unique product.

Now compare that, as the closing sentence of two, with other building materials in the same general field of usefulness.
412 We will show you that the prices of those products have gone up enormously, taking it from the Government report, during the last few years, while ours have remained practically on the same level. I emphasize that because it shows that something must be at work which countervails those economic forces which are putting up building costs all over this land. And what is at work in preventing that is, in the first place good management, second, honesty of purpose; and, third, and above all, the very agreements which enable us to get what we otherwise would not be able to get, mass production.

Profits. I am sure your Honor will see that the profits that the Masonite Company earns is nothing out of proportion at all, within reason, and have been declining. We still are able to operate at a substantial profit in this patented product of ours.

As to the agents, they will tell their own story. The story they tell us is that they are not, because of what has to come out of their commissions by way of costs to themselves, that they are not operating at a profit in hardboard although, having hardboard as an additional line in their show windows, so to speak, they do derive an advantage in the selling of all their products. I don't suppose that can be valued in terms of precise profit, but it enables them to complete the panel by having greater means of competition.

So, your Honor, we close in the confidence that all that we have done in the construction of this industry is not only not contrary to the law but has been in the public interest and, second, as honorable, patriotic American citizens desirous of being within the law according to the advice of their counsel, desirous of having peace with the Government, we have made an honest effort to accomplish that, and we trust that your Honor will derive from our presentation in this case a favorable judgment not only as to what we have done, but what we are now trying to do.

413 It has been stated to me that several of the counsel for some of the defendants would like to add a word in connection with the special situation of their own clients, and it was my suggestion that those who wish to speak speak in the order in which the agreements were made, chronologically, so that there will be some logical development.

And, therefore, if I could, I would like to introduce to your Honor Mr. Andrew J. Dallstream, of the Chicago Bar, who will speak for the Celotex Corporation. The Celotex Company has gone through 77B and has become the Celotex Corporation.

Mr. DALLSTREAM. If the Court please, I will endeavor not to cover any of the ground which Mr. Tuttle has covered, but only to fill in those spots in a chronological presentation of this case which I feel require filling in in so far as they relate to my own client, the Celotex Corporation.

The Celotex Corporation may, in a sense, be said to be a successor to the old Celotex Company, which was formed back in 1920. The Celotex Company was formed by three men, Bror Dahlberg, Treadway Munroe, and Carl Muench, each of whom had been active with the M. & O. Paper Company or with companies that served that company. They had developed, through a period of years of association, an idea that there could be developed a structural insulation which would have such structural qualities that it would replace, to a large extent, lumber in the whole building field. Up to that time all insulation had largely been of the blanket type or of the semi-structural type which, while it could be nailed on the building for the purpose of affording insulation, did not have sufficient structural strength to replace some of the materials that were normally used in the building industry and, at the same time, afford this new quality of structural insulation.

414 It appears that up until 1920 there was practically no conception on the part of the general public of what insulation was in relationship to the building industry. Those who were presented with insulating materials in their capacity as prospective purchasers thought that those who were endeavoring to sell them were talking about something that went around

wires. It was a new field. It had not been pioneered to any degree whatsoever. Dahlberg, Muench, and Munroe set out to find a vegetable material which recurred annually, which was a waste product suitable for no other use, which might be used for cheap structural insulation, which would give insulation against both heat and cold and, at the same time, replace some one of the materials normally used in the construction of a building.

After trying out straw, corn stalks, rice straw and many other materials, they finally hit upon bagasse as the material which they would use in the manufacture of their product. Bagasse, perchance your Honor not having had experience with that material, is that waste product which forms after the last bit of sugar has been extracted from sugar cane. It is the pithy substance which is left after the sugar cane has been ground and pressed and chewed up to take out, through successive steps, the last bit of sugar content and molasses that can be extracted from it. That material had been normally used for only one thing, for burning, because it had to be destroyed. If put upon the ground, it never rotted except after perhaps many, many years. If ploughed under, it remained in practically its natural state; so that it not only was a waste material, but one which had to be disposed of.

After developing a process by which bagasse could be cooked and processed and finally made into an insulation board having structural strength, and carrying on their experiments, the
415 old Celotex Company raised sufficient funds through the public to construct a plant which ultimately represented an investment of approximately $10,000,000 near New Orleans, Louisiana. That will commonly, in this trial, be called the Marrero Plant of Celotex.

That manufacturing process began in 1922 and, having been started, it was found they could manufacture an acceptable product, but there was no market for it.

At that time the building supply or building material industry, which largely was concerned with the local lumber yard, with which we are all familiar,—the local lumber yard and the material supply dealer distributed at that time only lumber, sash and a few products of that sort, perhaps coal as a side line, cement and some of those heavier materials. The specialty field had not yet entered the local lumber yard.

The Celotex Company set out, through years of advertising, through years of development work, to bring the local lumber dealer throughout the United States, of which there were more than 20,000, into the fold of those who would distribute these specialty items such as this wall board which Celotex was producing. And by 1926 or 1927 they had developed the local lumber dealer as the outlet for the distribution of this product, and it was well established and an extensive part of their business.

Attracted by this success in this new product and in this new industry and in this new method of distribution, company after company started to enter this field, carried on research work and started building factories for the development of insulation, using different types of material than bagasse.

I may say, because I think it is conceded by everyone, that outside of Celotex only one other company in the world is using bagasse as its basic material. That is the Hawaiian Cane
416 Company in Hawaii, which is a subsidiary operation to the Hawaiian sugar interests and largely operated for the purpose of affording employment in off seasons to their men.

In 1927 Celotex started the construction of experimental work on harder or more dense board, having little or no insulation qualities but having a greater density and some resistance to water and moisture.

It first carried those on by pressing the soft board which they had produced under pressure and steam, until it had greater density. In 1929 these experiments had been carried to the point where Celotex announced that it would offer to the public at an early date this denser board, which they called "Celotex Panel Board." It had many of the characteristics of the present Masonite hardboard.

Shortly after this announcement, the Masonite Corporation served notice upon the Celotex Company that it felt its new product would infringe valid patents of Masonite. Patent counsel representing Celotex and patent counsel representing Masonite discussed this matter along in 1929. We disclosed, in a general way, our processes and the materials from which they were making our new product. Masonite persisted in its insistence that they had valid patents and that our process and the use of our material in the making of our product would infringe their patents. We insisted, on the other hand, that we had valid patents which we felt would have to be infringed by Masonite if it continued in its so-called hardboard industry.

These negotiations took only a single form, a suggestion by Celotex that we make our patents available to them and that they make their patents available to us by licenses which, preferably, should be free licenses. Masonite refused all of these offers to cross-license and no counter suggestion of any character was ever made by the Masonite Corporation until a few weeks before October 10, 1933, many years later.

About 1930 or 1931, when the depths of the depression
417 were felt, the Celotex Corporation went through a very difficult period. The sugar industry in Louisiana was about to stop business, and Celotex had to step into the breech and find a way in which the quality of the sugar cane produced in Louisiana

could be improved upon, and finally through research efforts carried on by their engineers and experts which they retained, they were able to develop, by crossing cane from all over the world, a new type of cane which resisted the blight and the diseases which had affected Louisiana cane, and produced a new cane which assured a continuance of its source of supply.

This required the expenditure of practically all of the cash resources which Celotex had. The bottom of the depression, 1931, the complete destruction of the building industry as a result of the depression, the threatened patent litigation which ensued early in 1931, all brought about a situation where Celotex was forced into receivership. Its accounts receivable were all pledged, and it was without any resources to operate except on a day-to-day basis.

Judge Nields of the District Court of Delaware, to whom the first application for receivership was filed, appointed two outstanding lawyers as receivers of this company: Mr. Young of Chicago, who enjoyed, up to the time of his death, a reputation as one of the outstanding lawyers of Chicago, a man of the highest character and highest standing, in whom all the courts before whom he appeared placed great confidence, and justly so; and Mr. Colin Bell of Delaware was the other receiver.

Judge Wilkerson in Chicago in the ancillary proceedings appointed Mr. Young, who had practiced in his court for many years, as his ancillary receiver. Mr. Young entered upon his duties as receiver, not as a receiver in name but as an active participant in the direction and management of this business.

418 By the orders appointing the receivers, the officers and directors of these companies were not directed not to in any manner participate in any of the further activities of the company. The Court did, however, forbid Mr. Bell to retain certain of the personnel who had formerly occupied executive positions to serve as employees of the receivers.

The operations of the company were carried on from 1932 through until 1935 under the Delaware receivership, the Illinois and Louisiana ancillary receivership proceedings, and during the final year under Section 77B of the Bankruptcy Act, under proceedings pending again before Judge Nields in Delaware.

Following the decision of Judge Nields which held the Masonite patents valid but, on the other hand, held that they were not broad enough to include the entire vegetable kingdom, including bagasse, which Judge Nields found not to be a woody material, an appeal was taken by Masonite.

That cause was bitterly contested on both sides. Judge Nields entered orders authorizing the retention of patent counsel by the receivers, directing them to carry on the defense, and it was a

shock indeed, as the evidence will show, to the Celotex receivers and to all of those connected with the company, including their counsel, when the Circuit Court of Appeals decided that Judge Nields had been wrong in his decision in the lower court.

A petition for rehearing was filed and was vigorously argued. A petition for certiorari was filed in the Supreme Court after the petition for rehearing had been denied. It was only while the petition for rehearing was pending that the first suggestion came from the Masonite Corporation that they would enter into any arrangement with Celotex. Repeated efforts by the receivers to work out some sort of a manufacturing licensing arrangement that would assure Celotex the right to continue to manufacture had been repeatedly turned down and had not even been seri-
419 ously discussed by Masonite. I think the record will show, when it is complete, that the idea of this agency arrangement originated with one of counsel for Masonite.

Within the course of a few days of this arrangement it was put in practically final form, presented to the Celotex receivers, considered by them and their first desire was to refuse to enter into that agreement. Frantic research work was carried on during the entire time from the decision of the Circuit Court of Appeals, during the period while it was pending for rehearing and while the petition for certiorari was pending, endeavoring to find some way in which the Celotex receivers could continue to manufacture an acceptable product which they could distribute in competition with this hardboard which they had been enjoined from continuing to manufacture and distribute.

The files which will be offered in this case will disclose that every effort was made by the receivers to develop a new product. They had the best of patent counsel, many of them, collaborating with the research department. They made product after product, which looked as though it would be successful in the final operating stage, but which, when put on production proved punk, uneven in surface and otherwise commercially unacceptable or else, if it were to be produced alone, it would be at a cost so high that it could not be sold in competition with the product which the company was enjoined from manufacturing.

I think it must be clear now and will be throughout the trial, that when Judge Nields was asked to give his receivers authority to enter into this contract, and in the same order to direct his receivers to dismiss their petition for the writ of certiorari in the Supreme Court, he must have been activated by the same human motives which would activate any of us under those circumstances,
420 namely, a sincere personal desire to see his judgment in a patent case which he had spent a long time considering and deciding, sustained by the highest court in the land, yet with those

motives in mind, he determined that this settlement should be effected; that his receivers should dismiss their petition for certiorari and enter into this agency agreement, despite the fact that the industry saw with great reluctance the Celotex Company relieved from the manufacture of hardboard.

When the final reorganization came on, the same judge was faced with the decision as to which of the agreements entered into by the receivers and trustees should be continued in effect and which should be assumed by this new creature which had been set up by the plan of reorganization, and there again the court was bound to pass upon the agreements to be assumed and expressly directed that these contracts entered into by the receivers be expressly assumed in writing by the Celotex Corporation, and that it also file its agreement to be bound by all the terms thereof and to carry out and discharge those agreements.

The Celotex Corporation has not stopped research on hardboard. It did not even pause with the entry of this 1933 agreement. The research men of the company who will be brought forward as witnesses in the course of this trial will show that at all times since 1933 the company has carried on active research to try and find a way in which it can develop a process by which it may lawfully manufacture outside of this Masonite patent, held to be valid, a hard panel board which will compete with Masonite. That research is still continuing.

When we were apprised of the views of the Government as to the 1936 agreement, we endeavored in the 1941 agreement to obviate every criticism which we were able to ascertain the Government might level at that agreement or had leveled. Celotex is in this court fight for its life, because having spent years in developing the acceptance of the Masonite product among the twenty thousand lumber dealers which it serves, and having reached the point where practically ninety per cent of those dealers buy hardboard and softboard in the same car with the combined freight rates, we will lose, if we lost this lawsuit, not only the right to sell hardboard but we will lose the major portion of our softboard business because our customers will not buy softboard from us when by buying from Masonite, our competitor, who also manufactures softboard, they can get both hardboard products and softboard products in the same car, and continue to live the kind of hand-to-mouth existence that the local lumber dealer has lived on for many years.

421

We cannot expect the lumber dealer to buy softboard from us and take his chances on whether somebody else will sell him hardboard, when if he buys both from the same person he will receive service from that manufacturer which he might not otherwise get. It must necessarily also affect our gypsum business,

and our roofing business if we are unable to supply this item which for years our customers have been accustomed to purchase from us.

We feel that in entering into this agreement we haven't entered into, nor did our receivers enter into a conspiracy. We accepted the terms which the Masonite Company offered to us and we have preserved faithfully the terms of that agreement in the belief that it was valid and we are ready today to accept any revision of this agreement which we can obtain which will eliminate the so-called price-fixing which Masonite says it has a right to determine. We would be indeed pleased were those restrictions on the channels of distribution removed, but as counsel, I know of no way that that can be accomplished, and we will show throughout this case a sincere desire on the part of Celotex, first, not to utilize this agency arrangement one day longer than is necessary to give us a product and constant research
422 and constant willingness to start our own manufacture as soon as 1945 rolls around and we will expect at the end of 1945 to engage again in the manufacture of our own hardboard unless something new develops or some new obstacle is placed in our way.

Mr. TUTTLE. May I inquire whether counsel for the National Gypsum Company wishes to say anything, or counsel for Johns-Manville Sales Corporation?

Mr. CHANDLER. I have only a very few remarks to make at this time. The Johns-Manville Sales Corporation, a defendant agent here, is a wholly-owned subsidiary of the Johns-Manville Corporation, which as your Honor probably knows, is a large manufacturer by itself and through subsidiaries of a wide line of materials, not only in the building field, but in other fields as well. They make roofing, they make shingles, they make refractory products, they make asbestos textiles, various kinds of pipe; they make insulation board products, and hundreds of different things. Johns-Manville Corporation was not engaged in the manufacture of any hardboard product. They had been engaged prior to 1933 in the distribution of insulation board—softboard—they did not make hardboard. They did not have any research or manufacturing facilities directed along those lines. They followed with some interest the introduction in the industry of this new product manufactured by Masonite. They were aware of the infringement litigation that was going on between Masonite and Celotex. When the Circuit Court of Appeals in 1933 handed down the decision that Masonite's patent was valid and infringed by Celotex, they learned of that. They were interested in finding some way by which they could get the benefit of this new

product developed by Masonite and Johns-Manville made the approach to Masonite to try to find out if they could get the product, and as a result of that, Johns-Manville, the third in
423 succession, obtained in November 1933 an agency agreement, revised in 1936 and revised again recently in 1941, and under that agency agreement they have been able to add to their line this hardboard. What else could they have done? They could, I suppose, have gone out and built a large and expensive plant and engaged in a nice lot of patent litigation which might have ended in the nice new plant being closed down. They naturally didn't want to do that. They went to the available source and they worked out what they regarded and still regard as a sensible, reasonable business arrangement. The hardboard which they sell as agent for Masonite, which they obtain from Masonite on consignment, represents a relatively small part—a very small part—of the products distributed by Johns-Manville Sales Corporation. Last year I think the total gross sales of products of Johns-Manville was in the neighborhood of sixty-two million dollars, of which Masonite's hardboard accounted for approximately four hundred thousand dollars, but the product has, as counsel have previously indicated, considerable importance to us beyond what those figures would indicate. We have to build up as complete a line as we can, just as Mr. Dallstream said. In our case it is true also that the vast majority of our insulation board or hardboard goes in mixed carlots and takes the carlot freight, and the dealer wants to get his material, if he possibly can, from the same source, but apart from the insulation board and the hardboard situation, there is a very considerable advantage to us in dealing with building supply contractors and being able to offer to them the whole line, not only these board products but shingles and so on, and Masonite's product therefore is a very valuable supplement to our line, and the way we have been able to add it to our line has been by these agreements. We see nothing wrong in these agreements.
We saw nothing wrong with them when they were made
424 and we don't see anything wrong with them today. We feel they are reasonable business arrangements.

They have not prevented us, as the Government seems to have indicated, from developing competitive products of our own. In fact, we have developed an article of our own manufacture called Flexboard, which is an asbestos product, which is used for a great many purposes that Masonite hardboard is used for. I think for some uses Masonite hardboard is perhaps preferable but in some other uses our Flexboard is preferable. The two articles are very much in the competitive field, and the fact that we are agents of Masonite has not prevented us from developing that

product of ours, and last year we sold a great deal more of that than we have of Masonite. So far as we are concerned, we see no reason for complaint of any violation of the anti-trust laws in this case.

The COURT. We will take a recess now until 2:15.

(Recess until 2:15 p. m.)

AFTERNOON SESSION

Mr. TUTTLE. Mr. Lamb, for the Armstrong Cork Company.

Mr. LAMB. If your Honor please, I appear as trial counsel for the Armstrong Cork Company. In December of 1933 the Armstrong-Newport Company, which in this complaint is collectively referred to with the Armstrong Cork Company, defendant, entered into an agency agreement and a license option with the Masonite Corporation.

I would like to say, your Honor, that in entering into that agreement, it was the result of a perfectly normal, natural business evolution, and which had no connection whatsoever with any combination or conspiracy in restraint of trade.

425 The evidence will show that as early as 1920, the Armstrong Cork Company was engaged in the manufacture of a cork insulation product and that was used largely in the insulation of refrigerators, and the Armstrong Company enjoyed very good business in that type of insulating material.

In the latter part of the 1920's, however, there was produced a fiber insulating board which it was found was readily usable for insulating refrigerators and it presented a very severe and serious competition to the Armstrong Company in the field in which they were then engaged. Recognizing that it was important to be able to meet that competition, the Armstrong Company proceeded to find a way whereby it also could manufacture this fiber insulating board or material.

Now there was a very unique situation that then existed. The Armstrong Cork Company also manufactured large quantities of linoleum and in the manufacture of the linoleum, there are used large quantities of rosin substances which are extracted from Southern pine trees, and in order to procure a source of the pine oil and rosin which is used in large quantities in the manufacture of linoleum, a company called Newport Industries, Inc., having a manufacturing plant at Pensacola, Florida, was engaged in extracting pine oil and rosin from Southern flash pine, and the Armstrong Company was the largest customer of the Newport Company.

Now, as a by-product in manufacturing that pine oil and rosin, there was created as waste material the spent pine chips—very small chips from which substantially all of the rosin had been

extracted and by experiment it was discovered that that presented a very excellent material and a very cheap material out of which an insulating fiber board could be manufactured, so that the Newport Company, in conjunction with the Armstrong Company, proceeded to organize a new company called
426 Armstrong-Newport Company, and they each contributed fifty per cent of the capital and they each owned one-half of the issued stock.

They built a plant in Pensacola, Florida, immediately adjoining the rosin plant then operated by the Newport Company, and they commenced to manufacture a fiber insulating material which it was hoped could supplement the cork insulating material to meet the oncoming competition in the refrigerator field. But this art, your Honor, is a rapidly developing art, and no sooner had they completed the plans and the plant to manufacture an insulating material, when, lo and behold, there appeared upon the scene a glass insulating material which was readily adaptable for use in connection with refrigeration, and that presented a very formidable competitive force.

Then on top of that, as your Honor well knows,—this all occurred, I may say, in the early 1930s—in 1931 came the depression, and the demand for this insulation material, which was then ready to be placed on the market, declined very rapidly. As an insulating material, however, it was found that it could be compressed in boards and would serve many of the same purposes as an insulating board such as manufactured by the Celotex Company or the Johns-Manville Company, such as has been described this morning, and having their investment, and having the plant on their hands to produce this material, rather than see it all go to naught and result in a severe loss, they decided that as business men it was good judgment to enter into the business of offering an insulating board to the building trades industry. And they then announced that they would enter that trade, and offered those products to lumber dealers, wholesalers and jobbers, for building purposes.

But no sooner had they started that venture than they realized that they were in the peculiar position that they had but a
427 single board, a single building material, and as their salesmen went out and offered that product they were confronted with the situation, "Well, we can buy from you merely your insulating board. We need other articles. Among others, Masonite hardboard," which by that time had become well established in the market.

So they recognized that that happened so often that it would be desirable to consider whether or not they might add Masonite hardboard to their line.

Now they were primarily manufacturers, and so the natural thing that occurred to them was, We should manufacture hardboard, and in 1931 they undertook, knowing that there was a process patent and a product patent covering the operations of the Masonite Corporation, to obtain from the Masonite Corporation a license to manufacture the Masonite hardboard. They opened the negotiations. They discussed the matter with the Masonite representatives, but about that time, as has been described in greater detail this morning, the controversy between the Masonite Corporation and the Celotex Corporation arose, and naturally enough the Masonite people, for reasons sufficient unto themselves, concluded that this was not the opportune time to issue a manufacturing license to the Armstrong people, and it was impossible, apparently, to arrive at satisfactory terms and the amount of a royalty, and, the patent infringement suit having been commenced, nothing came of those negotiations, and no license to manufacture Masonite hardboard was entered into.

Now that was the situation in 1931, and as Mr. Dallstream has pointed out to you, continued until finally the Masonite-Celotex litigation was concluded, in 1933, when the first agency agreement between Masonite and Celotex was entered into, Masonite having then decided that it would enter into these agency agreements, informed the Armstrong-Newport Company, which was still trying to sell its insulation fiber board, that it might
428 make arrangements whereby it could offer Masonite hardboard for sale under an agency agreement, and such agency agreement was entered into on December 1, 1933.

As Mr. Tuttle has pointed out, the Government charges here that the unlawful conspiracy commenced on the specific date October 10, 1933, by the making of the agency agreement between Masonite and Celotex.

Now, our position is that when, on December 1, 1933, we entered into an agency agreement, it had nothing whatever to do with any understanding, arrangement, conspiracy or combination with the Celotex people or with the Masonite people. Our main purpose, your Honor, in obtaining that agreement, just as it had been in 1931, was to have an opportunity to promote trade, to be able to sell more of our insulation hardboard, and as an aid to that to have the right to sell, as an agent, Masonite hardboard.

And I say that with that agreement there was a step taken, so far as my client was concerned, being a newcomer in the building industry field, which enabled it at that time to compete more effectively with Celotex and with the Masonite Corporation, and it definitely was aided in a competitive effort by the 1933 agreement.

Now that 1933 agreement continued in effect all through the years 1933, 1934, 1935 and down through 1936, until October of 1936. There was a time in 1935 when the Masonite Corporation took the view that the quantity being sold by the Armstrong-Newport Company of Masonite hardboard did not measure up to the requirement of the contract, and there was an honest dispute as to whether or not there was a right to terminate the agreement. Armstrong resisted their contention that they could terminate the agreement. It was important to continue to have this means of competing effectively with the other people in the building industry trade. In any event, understandings
429 were made whereby the agreement was carried on and finally, in October of 1936, a new agreement was entered into which took the place of the agreement made in 1933, and the 1936 agreement continued in effect until this new agreement, effective March 20, 1941, was entered into last month.

Now, your Honor, as to those agreements which have been described and referred to by Government's counsel and by the other gentlemen who have spoken for the defendants, I only want to point out very briefly that the 1933 agreement and the 1936 agreement as well as the 1941 agreement are, as their terms state, clearly agency agreements.

Now, there are certain isolated parts and provisions in the 1933 agreement and in the 1936 agreement which, taken by themselves perhaps, out of their text and without reading the agreement as a whole, in a purely technical sense someone might say that they can be construed as being somewhat inconsistent with a true agency relationship. For example, the Government will point out, I have no doubt, that under the 1936 agreement, notwithstanding that ownership in the Masonite hardboard was retained by the Masonite Corporation, there were provisions whereby the burden of paying the freight was put upon the agent and the arrangement for the dates for the settlement of accounts might by technical constructions be considered as inconsistent with a true agency relationship. But I say that if you read those agreements in their entirety, they are just exactly what they purport to be, namely, agency agreements.

And the important fact is that the title in the Masonite hardboard under these agreements was retained in the Masonite Corporation at all times and, being the owner of their own product, naturally they had a right to fix the price at which their product would be sold.

Now as to the matter of price, so far as my client is concerned, we had no discussions whatsoever with the Masonite
430 Corporation, at any time, as to the price at which the product should be sold through the agency relationship.

I did not hear the Government suggest that there has been any unlawful act on the part of any of the agents, certainly not so far as our client is concerned, in conjunction with the Masonite Corporation, to fix the price at which the product should be sold to a buyer pursuant to the agency agreement.

Moreover, there is no suggestion made by the Government of an agent having sold hardboard to a buyer that any attempt was made to fasten upon the buyer any restriction as to the price at which he might in turn sell it. The ordinary buyers under this agency agreement were the classes of trade which were the normal outlet for the building industry, such as lumber dealers, wholesalers, and jobbers, and when they bought that product, whether it be from us as an agent or from any other agent, or from Masonite directly, that buyer had the right to do as he saw fit with that product from that moment on.

I don't understand that the Government relies on any different theory, or any attempt to fasten on the buyer a resale price agreement. The price we are concerned with here is the price fixed by the principal, the owner of the product, and applicable only to sales made by that principal's agent.

Now it is said that one of the objections to this agreement and its arrangement is that it is a horizontal price-fixing agreement and the Government attempts to distinguish our situation from the General Electric situation, and the reason they give is that in the General Electric case it does not appear that the manufacturer sells in competition with the agent, and here they say Masonite sells in competition with its agents.

Now I suggest to you that that would clearly indicate certainly a greater freedom and a greater competitive activ-
431 ity in this arrangement than was the case where the General Electric Company was concerned. There is no restraint upon the manufacturer himself. The manufacturer competes for the same class of trade, so far as the building industry outlets are concerned as do the agents themselves. It is most active competition and nothing in the agency agreement prevents that active competition.

As to the 1941 agreement, your Honor, I think you will see when you read the General Electric Company case, as I have no doubt you will, it takes the agency agreement in the General Electric Company case as its model.

I was one of a committee of lawyers representing these various defendants who had a large part in the drafting of this 1941 agreement, Mr. Quarles, Mr. Dallstream, and myself probably had as much to do with the preparation of the 1941 agreement in the first instance as anyone, and I know we conscientiously undertook to resolve any of these possible technical objections that

might have been made to isolated parts of the 1936 contract, and eliminating them, and that brought our situation so clearly and so definitely under the General Electric Company case, as Mr. Tuttle pointed out, that we stand four-square on that case. The present Government counsel apparently repudiates the statement earlier made by Government counsel that they intended to overrule that case. I am glad to hear now that they do not, and that it is not their intention, for certainly it is sound law written by one of the ablest justices who ever sat on the Supreme Court, and our case falls squarely within that part of the case having to do with agency for the sale of goods. That same relationship, your Honor, is repeated in many, many industries today. It is common practice among merchants to act as agents for manufacturers and manufacturers fix the prices at which the agents are to sell their product.

Now I would like to suggest, as it has already been pointed out, of course before we entered into the 1941 agreement it
432 was submitted to the Government and their suggestions were invited, and they told us, in substance and effect, that of course they could not express any opinion regarding its legality, but the important point as I see it, your Honor, is that they made no objection to the proposal which we then stated to them, that the defendants intended to execute and deliver the new agency agreements and make them effective prior to the taking of any testimony in this case. That is all set forth in our supplemental answer.

Under the 1941 agreements, as was true under the 1936 and 1937 agreements, the agents do guarantee the accounts payable which arise from the sale to various persons under these agency agreements, so there is still a del credere relationship and interest, which the agency has in the transactions under the 1941 contract, and we say that is a perfectly normal, natural relationship and a normal and natural interest, and I understand there is nothing in the law that prohibits it or interferes with it.

The COURT. I don't know whether I should interrupt the discussion, but I wonder if it could not be shortened a little. It was stated the other day that this case would take a week or two to try, and if that be so, I think it would be better to reserve the argument until we get through with the testimony.

Mr. LAMB. May I just point out in closing that we are a very small agent, our volume is not very large. As an agent in 1941 we sold about two and a half million feet of Masonite hardboard. If the Court should adopt the Government's contention to strike down this agency agreement, it means, of course, that we are prevented from selling that product as an aid to our product, and from competing, and I think that would go a long way toward securing to

the Masonite Corporation a greater monopoly than they now have.

433 We are free to buy from Masonite. The facts will show that my client in fact does buy quantities of Masonite hardboard in connection with its own fabricating process, and it sells a product which uses the Masonite hardboard as a base.

Now one other fact that the evidence on our part will show you, your Honor, is that not only in 1931 did we attempt to negotiate a license to manufacture, but again in 1938 we went into this matter and we made an exhaustive study of the cost of manufacturing under a license to manufacture, and we came to the very definite conclusion as a business matter that it would not be good business to make the investment, that it would have cost hundreds of thousands of dollars, to build the additional plant, and that it would be much more economical to have the right to sell the product under the agency agreement, as is set forth in the 1941 agreement.

Mr. TUTTLE. If your Honor please, there will be two other counsel, both of whom will be very brief. Next in order chronologically is Mr. Ewing for the Certain-Teed Products Corporation.

Mr. EWING. If your Honor please, my client, Certain-Teed Products Corporation, is a Maryland corporation, organized in 1917, with its principal business office here in New York City. It manufactures and distributes all kinds of building materials and products that are used in practically all types of business construction. The various types of products that it sells are listed in Exhibit S–3 attached to the stipulation.

In 1932 the Certain-Teed Products Corporation became the agent in the United States for the Hawaiian Cane Products, Limited. That was a company which manufactured insulation board in Hawaii from bagasse, which was described by Mr.

434 Dallstream this morning. When the Certain-Teed Products Corporation became the agent of the Hawaiian Cane Products in 1932 it desired at the same time, if possible, to get a line of hardboard products. Hawaiian Cane Products had none, and neither did Certain-Teed. They found that their customers were demanding this product. It is a product that is often used in connection with soft board. Insulation board will be used for insulation, and hardboard will be used on the surface with various other combinations.

Due to the fact that the carlots or carloads could be shipped at the same rate, customers wanted mixed lots which avoided the necessity of carrying such large inventory, and it was necessary also to have a complete line of goods. Our company did not conduct any direct negotiations at that time with the Masonite com-

pany, but the Hawaiian Cane Products did. They went to the Masonite company at that time, which was engaged in litigation with the Celotex Corporation—or Celotex Company it was then—and the Masonite company refused to consider any kind of an arrangement at all as long as that litigation was pending. It was in August of 1933 that the Certain-Teed Products Corporation learned that the patent litigation had been decided in favor of Masonite, and that the Masonite patents had been sustained. The evidence will show that in August of 1933 instructions were given to the research department of Certain-Teed Products Company to conduct an intensive investigation to find out if it were possible to manufacture a hardboard product that would not infringe the patents of the Masonite company, and that work was vigorously prosecuted.

At the same time the Hawaiian Cane Products entered into negotiations with the Masonite Corporation. At first the Masonite Corporation said that they would only consider a
425 manufacturing license, because, they said, the capacity of their plant at that time was fully committed. So that for a few weeks negotiations were centered on a manufacturing license. However, there were two objections that made it impossible to enter into any manufacturing agreement. The license fee was $200,000, with 10 per cent royalty, and a minimum royalty of $50,000 a year. The second reason that we could not consider taking a manufacturing license, even if it had been royalty-free, was that at that time our sales were around one million and a quarter—we had estimated that they would be about a million and a quarter feet of hardboard per year, that possibly we could get them up to around 3 million feet per year, but that the minimum production that you had to have for an economical conduct of a manufacturing establishment was somewheres between 25 and 30 million feet, and with a sales outlet of only about 3 million that thing was just impossible. So the negotiations were renewed in an endeavor to work out some basis whereby we could get this hardboard product from Masonite itself.

Finally, the Hawaiian Cane Products, which made the arrangements that were here made, in making that arrangement which was entered into in the utmost good faith, we had no contact with any defendant in this case except the Masonite company in those negotiations. We did know that all people were to be treated alike. We didn't like some of the provisions. They were made at arm's length. We were told we could take it or leave it. We had to have this product, and we took it. During those negotiations between the Hawaiian Cane Products Company and the Masonite Company, the Masonite company was informed that the Certain-Teed Products Corporation was the

agent of Hawaiian for the distribution in the United States, and that was agreed to.

That arrangement continued down until March of this year—rather, in 1937 there was an assignment of the
436 American rights for Continental United States—and the old arrangement was continued, although we did deal directly with Masonite, simply as the agent of Hawaiian. Now this arrangement continued down to the new agreement, and at that time we did make a direct contract with Masonite and Hawaiian, made a direct contract simply for Hawaiian. And under this new arrangement—and the reason that was made was simply because under the previous agreements the Government had said that it was not a genuine agency agreement, and there were certain differences between that contract and the contract that was executed in the General Electric case, which everyone considered immaterial and still consider immaterial, but to avoid any argument on it we made a new contract which is on all fours with the contract that was entered into that case, the contract that was approved in the General Electric case.

Now the Government asks for the relief of an injunction. The worst thing on earth that could happen in this industry is for these contracts to be knocked out. The Government admits that Masonite has a good patent. If they have a good patent and these distributing contracts are knocked out, they have got a complete monopoly of this business. They will put us all out of business, and with that they will take a major portion of our soft board business. And the worst thing that could happen in this industry would be for the Government to succeed in this case, and it is the surest way I know of to make customers pay more for their goods.

Mr. TUTTLE. Mr. Sewell is the next and last speaker.

Mr. SEWELL. If your Honor please, I would like to state very briefly the position of Insulite, with especial reference to the reason or motive of the Insulite Company for becoming one of the del credere agents.

437 The Government alleges that our purpose in entering this so-called conspiracy was to further monopoly, to restrain trade and to control prices. I can say with some assurance, and I think the evidence will bear me out, that that was the farthest thing from the thoughts of Insulite Company. Our one and only purpose, paradoxically enough, in entering into this contract, was to sell softboard. Insulite Company is a wholly owned subsidiary of Minnesota & Ontario Paper Company. One of the waste products of paper making, of course, is wood. This waste product was used profitably in making insulation board, or softboard, and Insulite Company was one of the

first companies in the field. Its primary interest has always been insulation board or softboard.

In the years preceding the making of this agency agreement it manufactured approximately ten times as much insulation board in board feet as it did hardboard, because Insulite also manufactured some hardboard of its own. In 1933 and 1934 Insulite was met with a strong demand on the part of its customers for a more extended line of hardboard products than it could then manufacture, and, as has been pointed out to your Honor—and I will not repeat the necessary interrelation of hardboard and softboard. Insulite investigated, and found that it was estimated that it would cost between $225,000 and $250,000 to put up a plant and to buy machinery necessary to enable it to compete with the Masonite line of hardboard. Now, during these years its parent company, Minnesota & Ontario Paper Company, reached perhaps the low point financially of the entire ten years of the reorganization of that company. Insulite had no independent capital, and it was manifestly impossible for Insulite to raise the necessary capital to put up the mill and buy the machinery to product a line of hardboard which could
438 compete with the Masonite line. Furthermore, the process used by Insulite at that time was a process which started with the manufacture of the board on the same machine that produced softboard. So that every bit of hardboard that was produced meant that Insulite could produce less softboard, which was its primary product and its primary interest. It was also found, after a careful investigation, that the waste in producing hardboard was greater than the waste in producing softboard. Therefore in a way Insulite was defeating its own ends by continuing to produce hardboard.

During the summer of 1934 Insulite conducted an extensive field survey of its customers, and as a result of that fact was met with a very sure demand, and it was reported that there was a demand for Masonite products. It being in a position where it was in no position, and could see no way to manufacture hardboard itself, and where it was steadily losing business because it could not manufacture hardboard to meet the demand, it really had no recourse but to enter into this agency agreement with Masonite. And this particular decision was hastened by the fact that in 1934 Insulite lost one of its chief customers because it was unable to fulfill its demand for hardboard, and was really driven to the decision.

I can say with assurance that there was no thought of furthering monopoly, no thought of restraining trade, and rather that it was a business decision which was forced on the company. And, finally, I would like to point out to your Honor—Mr.

Tuttle has mentioned it—that at all times during the course of this conspiracy, so-called, the parent company, the Minnesota & Ontario Paper Company, has been subject to the jurisdiction of the Federal District Court for the District of Minnesota.

This particular agreement was made pursuant to the
439 order of that Court. The Insulite Company has been operating more or less as a department of the parent. I think it is fair to say that there has never been an independent control. I think the trustees of the parent, in effect, ran the business of the Insulite, and this contract was disclosed to the Court and entered into pursuant to the order of the Court, and during the whole course of this alleged conspiracy Insulite, through its parent, has been subject to the jurisdiction of the Federal Court.

Mr. TUTTLE. The last counsel, your Honor, is Mr. Piel, who will speak for the Flintkote Company.

Mr. PIEL. If your Honor please, a very few words will describe the position of the Flintkote Company.

In 1940, the Flintkote Company sold more hardboard than it had ever sold before. Those sales of hardboard amounted to 1 percent of all sales of the company. Our annual report for 1940 shows that we made a net profit of approximately 8 percent on all of our sales. Our profit from the sale of hardboard is estimated at a little over 4 percent. I emphasize that fact in order to show that it is not any concern about revenues from hardboard or the prices at which hardboard could be sold which gives us concern in this case. We have built a plant for the manufacture of a hundred million feet of soft insulation board—softboard—per annum, and it is in that connection, for the reasons which have been mentioned by other counsel, that we found it desirable and, I think I may say, competitively necessary, for us to be able to offer hardboard to our customers as an adjunct to our sales of softboard and other products.

Mr. TUTTLE. This completes the openings for the defense, your Honor.

The COURT. Very well.

Mr. COX. With the Court's permission, I shall proceed to introduce testimony.

440 JAMES P. GILLIES, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. Cox:

Q. What is your present business, Mr. Gillies?—A. Connected with the Chicago Pneumatic Tool Company.

The COURT. What?

The WITNESS. The Chicago Pneumatic Tool Company.

Q. Were you ever associated with the Masonite Corporation?—A. I was.

Q. Can you tell us the date when that association began?—A. The fall of 1930.

Q. Can you be more precise than that?—A. I believe it was December 1930.

Q. December 1930?—A. Yes, sir.

Q. And how long did that association last, Mr. Gillies?—A. Five years.

Q. Was it exactly five years?—A. I think it was to August 1935.

Q. Were you an officer of the Masonite Corporation?—A. I was.

Q. And what position did you hold?—A. Executive vice president.

Q. Were you executive vice president throughout the period of time that you were associated with the Masonite Corporation?—A. I was.

Q. Now tell us, Mr. Gillies, what your duties were as executive vice president of the corporation?—A. I was in complete charge of the operations of the company and reported to the executive committee.

Q. Were those reports oral or written?—A. They were largely oral and partly written.

441 Q. Did you assist in any way in forming the policies of the company?—A. In a consultant capacity, yes.

Q. Whom did you consult with in that connection?—A. Largely with the executive committee.

Q. Did you consult with other officers?—A. Well, the other officers were the executive committee.

Q. Can you tell us who the members of the executive committee were?—A. Mr. Ben Alexander, Mr. Clark Everest, Mr. Matthew McCullough.

Q. Will you also tell us what positions or offices they held in the company?—A. Mr. Ben Alexander was president, Mr. Everest vice president, and I think Mr. McCullough was secretary.

Q. Were you a member of the executive committee?—A. No.

Q. Was there any particular division of duties between you and Mr. Alexander?—A. No.

Q. Between you and Mr. Mason?—A. Mr. Mason was in charge of the research part of the company.

Q. Did you have any duties in connection with the selling policy of the company?—A. Yes.

Q. Did you supervise the sales force?—A. Through a sales manager; yes.

Q. Who was the sales manager?—A. Mr. Wallace.

Q. Who was Mr. Saberson?—A. Mr. Saberson was also in the sales department in charge of all salesmen.

Q. Was he subordinate to Mr. Wallace?—A. He was.

Q. Who was Mr. Frambes?—A. I don't place him.

Q. Was it a part of your duties to represent the Masonite Corporation in any negotiations with other companies?—A. Yes.

Q. I should like to hand you a copy of the Stipulation of Facts which has been introduced in this case, and I call your attention, Mr. Gillies, to the table on page 22, which sets forth a list
442 of contracts which were made between Masonite and the companies listed there. Do you see that list?—A. That is right.

Q. Now, I ask you whether, after those contracts were executed, it was part of your regular duties to perform any duty in connection with the execution of those contracts?—A. Just what do you mean by that?

Q. I will put the question in more precise form, Mr. Gillies. Did you ever send out, as part of your duty as executive vice president, notices to the companies with whom you had these agreements, with respect to the interpretation or administration of the agreements?—A. Yes.

Q. That was part of your regular duty as executive vice president?—A. Yes.

Q. Now, Mr. Gillies, going back to the time when you first became associated with Masonite, was it selling hardboard at that time?—A. Yes.

Q. Did it have a large selling organization?—A. Fairly large.

Q. Can you give us any idea how many persons there were in it?—A. Somewhere in the neighborhood of fifty, I would say.

Q. That was the organization that Mr. Wallace was in charge of?—A. That is right.

Q. Do you know whether at that time, in 1930, any other company in addition to Masonite, was engaged in manufacturing hardboard?—A. Yes.

Q. And what company was that?—A. The Celotex Company.

Q. And was Celotex selling that——A. I think I ought to qualify that. They were manufacturing hard panel board.

Q. Do you know anything about, or did you then know about the physical characteristics of the hard panel board
443 that Celotex manufactured?—A. Only from our own survey of it, yes.

Q. Did you cause that to be examined in order to determine what its physical characteristics were?—A. Not myself directly, no.

Q. Would you say then that you have no personal knowledge

what those physical characteristics were?—A. I knew pretty well what the physical characteristics were, yes.

Q. Now, I want to call your attention, Mr. Gillies, to another statement in the Stipulation of Facts on page 10. You see the sentence that begins on the second line: "The term 'hardboard'."—A. That is right.

Q. And the words, "and is generally used as designating a fiber board product with weight from approximately 30 to 60 pounds per cubic foot or higher." Do you see those words?—A. Yes.

Q. Do you know whether the hard panel board which Celotex was making and selling in 1930 was as to weight approximately 30 to 60 pounds per cubic foot?—A. I would say that it did.

Q. Was Celotex selling this hard panel board in competition with Masonite at that time?—A. They were selling in the same market; yes.

Q. Selling in the same market. Do you recall now whether you received any report from your sales organization with respect to Celotex's sales of hard panel board?

Mr. TUTTLE. May I inquire whether these talks referred to were prior to the date of the litigation——

Mr. COX. Will you read the question, please.

(Question read.)

Q. I will amend that question to read: Do you recall now whether you received in 1930 or 1931 or 1932, any reports
444 from your sales organization with respect to the sales by Celotex of its hard panel board?—A. In all probability I did.

Q. Do you recall now what the nature of those reports was?

Mr. TUTTLE. If they are to be called for and if they are in writing, of course that is another matter. There is no doubt, your Honor, as shown by the stipulation that we considered the hard panel board, so-called, of the Celotex Company as entering into a certain amount of competition.

Mr. COX. First I had better strike that question. Strike the last question.

Q. I now ask you, Mr. Gillies, whether those reports were oral or in writing?—A. Probably both.

Q. Taking first the oral reports, do you recall now what the nature of those reports was?

Mr. TUTTLE. If your Honor please, I object as utterly immaterial and irrelevant.

The COURT. If you will make it short, I will let him testify briefly on it, although I don't see what the materiality of it is now, but I want to get the entire background of this picture.

Mr. COX. I take it the witness may answer. Do you recall?

The COURT. He may, if he is able to.

Mr. Cox. Do you recall the question?

The WITNESS. The question was, what did those oral reports purport to be?

Q. Yes.—A. I wouldn't know at this time.

Q. Do you recall, Mr. Gillies, when the first negotiations
445 between Masonite and Celotex took place with respect to the subject matter of hardboard?—A. We were threatening the Celotex with suit almost immediately after I came with the company.

Q. Do you recall any other negotiations?

The COURT. That is a pretty broad word to be used.

Mr. Cox. I will amend the question, your Honor.

Q. In 1931, Mr. Gillies, did you at any time talk to any representative of Celotex with respect to a patent licensing arrangement?—A. In 1931?

Q. Or 1932. Take 1931 first, and see if you recall anything about that?—A. I very probably did.

Q. Do you recall with whom you carried on those discussions, with the name of the person who represented Celotex?

Mr. TUTTLE. Your Honor, in the interest of brevity, may I call attention to the fact, in paragraph 39, it is agreed that between 1939 and 1941, for the purpose of avoiding patent litigation, there were some negotiations between these two companies relative to the possibility of a licensing arrangement, and Masonite ultimately refused to enter into such an agreement.

Mr. Cox. That was a preliminary question, and I am willing to skip it because I was leading to something else in order to take him to a point that I wanted to question him about. Will you read the question?

(Question read.)

By the Court:

Q. You are fully at your ease at present, aren't you?—A. Yes, I feel very much at home.

446 The COURT. Before you get through, you won't find anybody threatening you in this court.

Mr. Cox. Will you read the last question.

(Question read.)

Mr. Cox. Do I understand you object to that question?

Mr. TUTTLE. I did, because in view of the stipulations we have, that is all that was necessary by way of introductory matter. There is no doubt about the fact.

Mr. Cox. I am now inquiring as to names of persons with whom he carried on conversations.

Mr. TUTTLE. If it is a mere matter of names, and the witness can

state, I will withdraw the objection.—A. Mr. Dahlberg, Mr. Muench, Munroe, Hampson, and probably half a dozen others.

By Mr. Cox:

Q. Do you recall a Mr. Hackett?—A. Hackett? I don't place him.

Q. In these discussions did you yourself ever say anything about the price at which hardboard was being sold by Masonite?

Mr. TUTTLE. I shall object to that, if your Honor please.

The COURT. Sustained.

Mr. Cox. May I ask if the objection is sustained, and I take it it has been, that I be given the advantage of the provision of subparagraph (c) of Rule 43, so that we may have the record on this evidence I may get from this witness.

447 The COURT. I don't know what the rule is that you refer to. I sustained the objection on the ground that it is at least suggestive to say nothing about its being leading.

Mr. Cox. Well, it certainly was leading, and I should like to make this point about that, your Honor.

The COURT. I don't know that we need any argument. Let's get along with this case. We have just started it. Go ahead and ask the questions and let him give his testimony whatever way he wants to. I hope we are not going to be too formal in this case.

Mr. Cox. Well, I hope not, too, sir.

The COURT. About testimony, about objections and exceptions and all the rest of it. Furthermore, exceptions have been abolished, and that is one of the few rules that I know something about.

Mr. Cox. I am not worried about the exceptions, your Honor, but I mean—I don't think this is important at this point, but I do and shall wish perhaps at times to make some attempt to preserve the record of the excluded evidence so that if the Appellate Court wishes to look at it—I don't know whether it will or not—the evidence will be there.

By Mr. Cox:

Q. In 1930, Mr. Gillies, did you talk to representatives of any company other than Celotex about a patent licensing arrangement?—A. I was in the public utilities business most of that year.

Q. In 1931, did you talk to anyone else except Celotex?—A. Will you repeat your question?

Q. In 1931, did you talk to representatives of any com-
448 pany except Celotex about a patent licensing arrangement?—A. Oh, many of them.

Q. Will you give us the names of those companies?—A. Armstrong Cork, Johns-Manville, Agasote, National Gypsum Company and the United States Gypsum Company.

Q. Now I call your attention to a paragraph of a stipulation which appears on page 16, which states:

"Thereafter, on October 19th, 1932 the United States District Court for the District of Delaware held that Masonite's Patent No. 1,663,505 was valid but limited to products made of natural wood fiber, and therefore not infringed."

I ask you whether, after that date, you participated in any discussions with representatives of Celotex with respect to a patent license arrangement?—A. Yes.

Q. Do you recall how many of those conferences there were?—A. In all probability, there were several of them.

Q. Do you remember when they were?—A. I don't remember the exact dates, no.

Q. Do you remember whether there was one in October of 1932?—A. I can't fix the date. I know more about places than I do about dates.

Mr. Cox. I ask to have this marked for identification.

(Marked "Government's Exhibit 1" for identification.)

Q. Now, Mr. Gillies, I hand you what purports to be a photostatic copy of a letter written by you to Mr. W. R. Mason and dated October 31, 1932, and ask you to look at it [handing].—A. Yes, sir.

449 Q. Does that refresh your recollection as to whether there was a meeting between you and representatives of the Celotex Company in October 1932?—A. As I said before, there was a meeting that fall; I don't remember the exact date of it.

Q. Does this refresh your recollection as to the date?—A. Yes.

Q. Now do you recall what was said at that conference?—A. Well, I was reporting to Mr. Mason, who was the biggest stockholder of our company. Mr. Mason knew every part of my negotiations with Celotex and everybody else. We discussed it over the telephone, we discussed it in person, we discussed it through the mail, and if there was some extraordinary events that happened that he was not wise to, I always told him, and that letter was in the nature of a report of that kind.

Q. Well now, I ask you whether you now have any recollection of what you said at that conference on October 31, 1932?—A. Probably said a lot of things.

Q. Well, do you remember specifically anything that you said?—A. Probably said good-bye and how-do-you-do and several other things.

Q. Well, did you say anything else than that, Mr. Gillies?—A. Probably a great many things.

Q. I ask you to examine this document again and tell me

whether—look at it first and I will ask you the question.—A. All right.

Q. Now I ask you whether or not that letter of yours to Mr. Mason is an accurate account of what you said at that conference?—A. It was a very partial account of what I said.

Q. Well, is it accurate so far as it goes?—A. I believe so.

Q. And was it an accurate account of what Mr. Dahlberg said to you?—A. It is a partial account of what Mr. Dahlberg in all probability said to me; yes.

450 Q. Well, is it accurate so far as it went in that respect?—A. Well, it depends. It depends on what you mean by accuracy. If it means conveyed to Mr. Mason what it may convey to you, I would say no.

Q. That is not what I mean. I mean to ask you whether when you wrote this letter to Mr. Mason, you tried to tell him the truth about what happened at that meeting?—A. I would not have written that letter otherwise.

Q. That is what I thought; and that is your present view today, that it is a true account of what happened, isn't it?—A. I would say it conveyed a true account to Mr. Mason, because he knew all the circumstances connected with it.

Mr. Cox. I am going to offer this letter in evidence.

Mr. TUTTLE. If your Honor please, I object to that letter. In the first place, as is set forth in the stipulation, nothing came of those talks, and the agreement that they made in 1933 was made under altogether different circumstances.

The COURT. Don't give me any argument about it.

By the Court:

Q. Will you just look at this again and then tell me, in substance, not what you find in the letter, but what your recollection now is the substance of this conversation which you had with the representatives of the Celotex Company?—A. Well, Judge, this letter was written to Mr. Mason just after we had had an adverse decision from Judge Nields.

Q. I understand that. Now what is your recollection of the conversation that you had which is referred to in the letter, not about what you said, but—not your recollection of what you said in the letter to Mr. Mason; but what is your recollection

451 now of the whole thing?—A. My recollection of the whole thing is that we were all in a fog and we did not know where we were going or what we were going to do.

Q. Well, I hope that fog has not continued down to the present time, with all of the indications that it has.—A. Well, the thing that I went over, probably—in fact I know I went over to see Mr. Dahlberg of the Celotex Company on the question of where

do we go from here, and what are we going to do now, both of us being vitally interested, and this decision had left us with absolutely nothing. Our business was hardboard largely, and with this condition we were simply in the position that we had nothing we could do; we were a small company with no distribution, in the most difficult business that there was to secure distribution, and with practically all of the final distributing elements in the hands of different people who had been in the game longer than we had. Our only dream of survival was in the securing of distribution through others, and that was the one thing I had constantly in my mind.

Q. What did you say to Mr. Dahlberg and what, in substance, did he say to you, if you have any recollection?—A. Well, in substance it was, where do we go from here or what are we going to do and what are you going to do.

Q. You had some suggestion and he had some suggestion as to where you should go?—A. Mr. Dahlberg's idea was and Judge Nields had found they had some patents, and we had some patents, and possibly by combining these two things we could have something for somebody or for everybody.

Mr. Cox. As I understand it, I have offered a document and there has been an objection.

The Court. I suppose there is an objection.

Mr. Tuttle. I did object, your Honor, on the ground, in the first place, that it is immaterial, and the date, which was a mere expression by this individual witness——

452 The Court. I will sustain the objection. Mark it for identification.

By Mr. Cox:

Q. Now, Mr. Gillies, I want to call your attention to one statement which you made in this letter of October 31st, which has been marked as Government's Exhibit 1 for identification. The statement reads as follows:

"We told Dahlberg that as we could see Judge Nields's decision had not left anybody with anything. Certainly under his decision there was no way in which we could license anybody and give them the necessary price protection as well as secure it for ourselves. Dahlberg's thought was by a pooling of the patents it might be possible to set up some kind of a price control."

Now I ask you whether that refreshes your recollection as to anything you said at that conference?—A. No.

Q. Are you prepared to say now that you did not say that?—A. No; I am not prepared to say that at all.

Q. You have no present recollection whether you said it or

not?—A. My present recollection is that this was part of an entire conversation.

Q. I am asking you whether you have any present recollection as to whether you said the particular thing which I read to you?—A. If I reported that to Mr. Mason in a letter to him, I said it.

Q. Now I call your attention to another paragraph, which appears on the second page of Government's Exhibit 1 for identification, which reads as follows:

"It seemed to be both Mr. Hampson's and Mr. Munroe's opinion that nothing would be gained by appeal, but
453 that there was extreme likelihood of considerable being lost, that the only thing the Appellate Court would do would be to either sustain or reverse Nields's opinion, and that that was not an adjudication of the patent but more or less a judgment on the judge, all of which, of course, I think is a lot of hooey, but I don't know enough about law to express myself." I ask you, Mr. Gillies, whether that refreshes your recollection as to anything Mr. Hampson and Mr. Munroe said to you in that conference?

Mr. TUTTLE. May I interpose an objection? I can't conceive of a more perfect example of the immaterial.

This gentleman is a layman.

The COURT. Yes. I think it is perhaps a proper characterization. I don't know but what it might almost apply here.

Mr. COX. It may, but I suggest that all this material is relevant to the intent of the parties in this case, your Honor, and I suggest that I am entitled to show anything that bears on the frame of mind—

The COURT. I am not stopping you for a minute.

Mr. TUTTLE. I object to that question. It seems to me that what has been read from the letter, which has been refused in evidence, is utterly immaterial on its face. It is mere colloquial chit-chat.

The COURT. It is already part of the record. Let us get along to something else now.

Mr. COX. Unfortunately I have one more sentence I want to ask the witness about, and then I will be through.

Q. The next to the last paragraph in this letter reads as follows:

454 "Dahlberg's whole attitude seemed to be that he was perfectly willing to do anything which was constructive in setting up some kind of an establishment which could license and control the price situation."

Now I ask you, Mr. Gillies, whether that refreshes your recollection as to anything that Mr. Dahlberg said to you?

Mr. TUTTLE. If the Court please, in the first place I object to the method. This letter is not in evidence, and reading from it this way is an inappropriate way of refreshing the witness's recollection.

The COURT. I guess that is probably true. I will sustain the objection.

Mr. Cox. I would like to be heard on that. I don't believe it is.

The COURT. I would rather not hear you at the present time.

Mr. Cox. The witness obviously has no present recollection of the details of this conversation. It seems to me we can refresh his recollection with anything.

Mr. TUTTLE. He can refresh his recollection by being shown the letter.

The COURT. What is the use of getting into a discussion about a question like that now. I will concede from a strict standpoint that you are right, but here we are commencing this case, and I can't see that it does any harm whatever. He tried to refresh his recollection by a written document, and now he is reading to him—reading it into the record, all right.

The WITNESS. Judge, the only thing I can say about that is that in all probablity——

455 The COURT. Not in all probability.

The WITNESS. Whatever I have reported——

The COURT. You have already said that. Excuse me for interrupting you.

The WITNESS. Whatever I reported to Mr. Mason I reported in good faith.

The COURT. Do you remember that Mr. Dahlberg made any such statement as referred to in this letter?

The WITNESS. It was all part of a general conversation as to just what we were going to do.

The COURT. All right.

By Mr. Cox:

Q. Now, Mr. Gillies, in 1932 do you recall whether the Insulite Company was manufacturing hardboard?—A. I don't think they came out with a board until somewhat later. I think it was in 1933 when they first came out with it.

Q. Do you know whether that board was sold in competition with the board sold by Masonite?—A. Yes.

Q. Do you know anything about the physical characteristics of that board which was sold by Insulite?—A. Certainly.

Q. Did you at any time discuss with any representative of Insulite a patent licensing agreement?—A. Surely.

Q. Did you approach Insulite, or did Insulite approach Masonite?—A. I can't answer that at the moment. I don't know what the chronology was.

Q. You can't recall whether you went to them or they came to you?—A. I could not state that definitely, no.

Q. Did you personally ever visit the Insulite offices in Minneapolis?—A. Oh, yes.

456 Q. Do you recall whether you ever visited those offices in 1933?—A. During those years; yes.

Q. Well, to be more specific, do you recall whether you visited the offices in October, 1933?—A. No; I couldn't say.

Q. You couldn't say.

Mr. Cox. Will you mark this letter for identification.

(Marked "Government's Exhibit 2" for identification.)

Q. I hand you what purports to be a photostatic copy of a letter that you wrote to Harold C. Harvey, president of the Agasote Millboard Company, Trenton, New Jersey, dated December 6, 1933, and I ask you whether in fact you did write and send that letter to Mr. Harvey?—A. Yes; that is my signature.

Q. Can you tell me under what circumstances you wrote this letter? Do you recall why you wrote it?—A. I recall that Mr. Harvey had come to us for an agency agreement, and the question with us at that time was whether he had sufficient distribution for entering into an agreement of the agency type. The thing we were after was a national distribution. Mr. Harvey's was almost purely local. He made an entirely different type of material from most anyone else. He made it in much larger sizes than was ordinarily used in the industry, and he had for that reason certain customers which were unique, and which the rest of us didn't have. No one else had except Mr. Harvey, and he wanted to sell certain boards to the shipbuilding industry.

Q. They can't hear you, Mr. Gillies. They ask you to speak louder. The people at the second table can't hear you.

At the time when this letter was written, that is in

457 December 1933, were you carrying on conversations with Insulite as to some kind of a contractual agreement as to hardboard?—A. Yes.

Q. Were you carrying on negotiations with the other companies you referred to a moment ago at the same time?—A. In the fall of 1933?

Q. Yes.—A. Yes; with some of them.

Q. At that time do you recall whether the Masonite Corporation had any policy with respect to what companies it would carry on negotiations with of that kind?—A. Our policy was to carry on negotiations in order to secure as much national dis-

tribution as we could. We were interested only in those who had national distribution.

Q. Were you confining your negotiations to that particular group of companies, then, that had national distribution; is that correct?—A. That was our main operation.

Q. And was it the policy of the company at that time to conclude some kind of contractual arrangement with all of those companies?—A. It was our policy to make it available to anybody who wanted it, in addition to those that we ourselves wanted.

Q. Was it your policy to include in these arrangements all companies which were manufacturing hardboard and selling it in competition with you at that time?—A. Not necessarily, no.

Q. Now, Mr. Gillies, I want to call your attention to the last paragraph of that letter of December 6th which I asked you to read. You didn't look at it before [handing to witness]. Is that last paragraph an accurate statement of what the policy of your company was at that time?—A. I would say yes.

Mr. Cox. I am going to offer this letter in evidence.

458 Mr. TUTTLE. I object to it, your Honor, as simply an individual expression in somewhat colloquial form of one of the officers of the Masonite Company.

The COURT. I don't understand quite the basis on which you offer these letters, unless it be that Mr. Gillies by writing this letter was making an admission on behalf of the Masonite Company.

Mr. COX. That is precisely the theory on which it is offered. He was familiar with the policy of the company, as he has testified, and was engaged in carrying it out. It seems if any officer could bind the company by an admission he could.

Mr. TUTTLE. I don't see anything that is material in this letter. To show that they wanted to treat everybody alike —

The COURT. What is your attitude on the question that I submitted, as to whether a letter written by Mr. Gillies in 1933 is competent to bind the Masonite Company as an admission, regardless of what it contains?

Mr. TUTTLE. I don't think it can bind the Masonite Company as an admission in a case like this. It is merely an expression of his own personal opinion.

The COURT. Well, you might mark it for identification. It has been marked for identification. I will let it stand for identification at the present time.

Mr. COX. I understand your Honor has excluded it from evidence.

The COURT. At the present time, yes. You can bring it up later.

Q. Do you recall whether in 1933 there was any discussion between you and a representative of Celotex with respect
459 to an arrangement whereby the Masonite Corporation would make a certain kind of hardboard for Celotex?

Mr. TUTTLE. May I have that question read, please?

Q. (Question read.)—A. Yes; we entered into a contract with them that year to manufacture hardboard for them.

Mr. Cox. Mr. Tuttle, is that contract one of the contracts which has been attached to the stipulation?

Mr. TUTTLE. I assume he is referring to the contract of October 10th, 1933.

Q. Is that the contract you refer to?—A. Yes.

Q. There was no other contract of any kind, as far as you know?—A. Not that I recall.

Q. There was no arrangement which was not in contractual form earlier in that year whereby Masonite produced hardboard for Celotex?—A. Not that I know of.

Mr. TUTTLE. When you say there was no other contract, the contract is in several parts, the main agreement; and supplemental agreements.

Mr. Cox. I understand that, and the witness, I think, understands it.

Q. Mr. Gillies, do you recall a proceeding in the Circuit Court of Appeals that is set out in the stipulation of facts?—A. Yes.

Q. After that were consultations renewed between your company and the Celotex Company with respect to arrangements regarding hardboard?—A. Yes.

Q. Did you initiate those conversations by going to the Celotex Company?—A. I did.

Q. Do you remember when those conversations began
460 after the decision of the Circuit Court of Appeals?—A. It came very soon after that decision.

Q. Do you recall whether that came before or after Celotex filed a petition for a writ of certiorari?—A. It must have been before, because it was immediately after the decision was rendered.

Q. Can you tell us why you initiated those conversations?

Mr. TUTTLE. I object to that question. That is calling for the witness's mental processes.

The COURT. The objection is sustained.

Q. Was the resumption of negotiations a matter of discussion between you and the executive committee of Masonite before you went to the Celotex representatives?—A. Yes.

Q. What did you say in those conversations? A. Oh, Lord! What conversation?

Mr. Cox. Read the last question and the last answer to the witness.

(Question and answer read.)

Mr. TUTTLE. I object to that as immaterial. The negotiations had at some time resulted in an agreement which was in writing and is a part of the stipulation. What the preliminary discussions among themselves were, would be entirely immaterial.

The COURT. You cannot get very far by going into that at any great length. However, I will permit you to ask and he may testify as to his recollection about what transpired, if he can do it
461 briefly, after the decision of the Circuit Court of Appeals.

The WITNESS. Naturally, after we received the decision——

By the COURT:

Q. You were very jubilant about it?—A. We were very jubilant, that is right; we were kingpin, the top dog.

Q. You talked with Mr. Mason and the other officers of the company about what you were going to do, and then you saw Mr. Sullivan of Celotex?—A. Yes.

Q. Whereabouts did you see him?—A. In his office.

Q. Where was that?—A. It was up here in the Drake Hotel.

Q. Mr. Celotex in the meantime had become a trustee, or two trustees or two receivers, is that it?—A. Several; yes, sir.

Q. Now tell us about what took place when you were there?—A. As I remember it, after we had received a favorable decision from the Circuit Court, we had a meeting of the executive committee, at which we had to decide on some type of policy, now that we had the decision, what were we going to do with it, and where were we going with it. We had two roads open. The first was to make Celotex pay through the nose for what we considered the inconvenience and trouble they caused us. The company was pretty badly broke. We had spent——

Q. What company are you referring to?—A. Masonite.

Q. How about the Celotex Company?—A. They were just as badly off. We both spent about everything we had on this suit. The question was as to how we might proceed to the best advantage and how we could make the most money out of the decision that we had finally obtained through a lot of sweat, toil.

462 Q. Tears and money?—A. Yes; tears and money. We had it, and the question was, where were we going with it. It was finally decided, what we would do after this decision, was to get just as much distribution as we could get. With our own meager distribution we were running at that time about three days per four-week period. Three days at the end of the period and three days at the beginning of the next. Then we would shut down for 17 days. Our men were on scant meals or rations. We

were using every possible means we knew to see that the people in the plant had enough to eat. We were doing community buying for them, and even put in a canning factory in order to try to tide over this time. It was under those conditions that this decision came through.

Naturally, the Celotex had additional distribution which they had secured during the infringement period and we were very eager to get that additional capacity because it would also reduce the cost of the material we were making for our own distribution. but our feeling toward Celotex at that time was extremely bitter and our whole thought was that we would go any place else before we would go to Celotex. So we picked out two or three of the largest distributors with a view of opening preliminary discussions with them. Then we had our own meeting and after that time came, I got together with Mr. Dahlberg on the basis that the war was over and now the thing to do was to see if we couldn't both improve our positions under our patent structure. Mr. Dahlberg at that time was unable to carry on any negotiations except as he consulted with his own receivers.

Q. Who was Mr. Dahlberg?—A. Mr. Dahlberg had been president of the Celotex Company before it went into receivership and was still operating the company under the receivers.

463 By Mr. Cox:

Q. Mr. Gillies, you have told us what was discussed at the meeting by you with the other officers of Masonite, after the Circuit Court of Appeals decision, is that right?—A. That is right.

Q. Was there anything said in this discussion about Celotex's petition for a writ of certiorari?—A. The question must have come up, but we never took that seriously.

Q. Do you recall whether anything was said about what the Supreme Court might do if it took the case?—A. We thought there was about a chance in a million that they would take it, and if they did take it, we felt they might throw it out.

Q. They might throw the patent out?—A. They might throw the patent out.

Q. Were you advised that that was the case by your patent counsel?—A. We were told that it was more or less the policy of the Supreme Court to be hostile to all patents.

The COURT. That was 1933?

The WITNESS. Yes.

The COURT. They began early. One in a million I guess is about right.

Q. Well, the one in the million was the chance of issuing a

writ; is that right, Mr. Gillies?—A. There was one chance in a million the court might hear it.

Q. Isn't it a fact that your patent counsel advised you that there was at least a good chance that they might issue the writ of certiorari?

Mr. TUTTLE. I object to that.

464 The COURT. You don't have to try that patent counsel here yet.

Mr. TUTTLE. I can't see that it binds us or any of the defendants.

The COURT. If he was a patent attorney, I don't think he ever gave them that advice.

Mr. COX. Mark this for identification.

(Marked "Government's Exhibit 3" for identification.)

Q. And who was Herbert H. Dyke, do you know?—A. He was a patent attorney for Mr. Thomas A. Edison for a number of years and also for Masonite Corporation.

Q. I hand you this document, which has been marked "Government's Exhibit 3" for identification, and ask you whether, in fact, that is a letter which you received from Mr. Dyke?—A. Yes.

Mr. COX. I offer this letter, on the ground that it evidences the frame of mind of the defendants in that first meeting on the agreement in October 1933.

Mr. TUTTLE. In the first place, I don't see how an expression from counsel as to his opinion is competent.

The COURT. Objection sustained.

Mr. COX. Now will you mark this one for identification?

(Marked "Government's Exhibit 4" for identification.)

Q. Now I ask you whether this is a letter, this letter which purports to be a letter from Mr. Dyke to you, dated August 24, 1933, is a letter which, in fact, you actually received?—A. Yes.

465 Mr. COX. I offer this letter on the same ground.

Mr. TUTTLE. Same objection, if your Honor please; counsel's opinion.

The COURT. Same ruling.

Q. Now, Mr. Gillies, you told us that after these conversations with the other officers and with the executive committee, you went to see Mr. Dahlberg; is that right?—A. Yes.

Q. You went to see him in his office in Chicago?—A. That is right.

Q. Was anyone else present when you talked to Mr. Dahlberg?—A. I think Mr. Alexander was there.

Q. You say Mr. Alexander was there?—A. I think Mr. Alexander went with me. I am not sure.

Q. Was anyone else there?—A. Probably there were several Celotex people there. I seldom saw Mr. Dahlberg alone.

Q. Do you know the names now of any of those people?—A. I could do some good guessing. Probably Mr. Munroe, Mr. Mtnch, Mr. Hampson, their attorney.

Q. Was there a Mr. Colin C. Bell there?—A. No.

Q. Was there a Mr. Hobart P. Young there?—A. Not at that meeting.

Q. Did you ever talk to Mr. Bell at any time about anything?—A. Never talked to Mr. Bell. I talked to Mr. Young and Mr. Lutkin, his attorney.

Q. When did you talk to Mr. Young; do you recall?—A. I can't remember the exact date; no.

Q. Was it before the execution of the agreement with Celotex?—A. I talked to Mr. Lutkin, in fact, most of our negotiations of this agreement were carried on with Mr. Lutkin.

Mr. TUTTLE. Who was counsel for the receivers?

The WITNESS. Counsel for Mr. Bell.

466 Mr. TUTTLE. They were the receivers?

The WITNESS. That is right.

Q. Were those negotiations carried on with Mr. Lutkin alone?—A. In some instances.

Q. Did you carry on a negotiation with Mr. Dahlberg to any degree?—A. Mr. Dahlberg was present at most of them, surely.

Q. Did you discuss the terms of the proposed agreement with Mr. Dahlberg?—A. No; not before it was submitted to him.

Q. Well, after it was submitted, did you discuss it with him?—A. After it was submitted to Mr. Dahlberg, as I remember it, he wrote a letter in which he criticized the various terms and conditions.

Q. Did you ever get any letters from Mr. Lutkin about the proposed agreement?—A. In all probability.

Mr. Cox. Do you have any such letters, Mr. Tuttle, because we have none.

Mr. TUTTLE. Not that I know of.

Mr. Cox. May I inquire, too, whether any letters were received by Masonite Corporation from either Mr. Bell or Mr. Young with respect to the proposed agreement prior to its execution?

Mr. TUTTLE. I don't believe we have had notice to make a search, but we will make a search.

Mr. Cox. Very well.

Q. Was it a part of the arrangement which you made with Celotex that Celotex would withdraw its petition for a writ of certiorari?

Mr. TUTTLE. If your Honor please, that is right in the written agreement.

The COURT. Sustained.

467 Q. Did you, in the course of these conversations with Mr. Dahlberg, say anything about the price of hardboard?—A. That was right in the agreement, of course.

Q. Now I am going to ask the reporter to read the question to you again and see if you can answer it.

Q. (Read.)—A. Sure; I told him he would set it.

The COURT. You said what?

The WITNESS. I told him under our patent that we would make the price on hardboard.

Q. Did you say anything about the prices at which Masonite would sell hardboard?—A. I told him naturally the prices for which we sold to our own dealers would be the prices at which we would expect him to handle the board too. We had a patented product.

Q. Did you say anything to Mr. Dahlberg about the price of insulation board in the course of these conversations?—A. No, sir. Insulation board never entered into the subject. So far as we were concerned, we were not interested in it.

Q. Do you recall whether any time during 1931 and 1934 you discussed the price of insulation board with Mr. Dahlberg?—A. In all probability.

Q. Do you recall more precisely when this conversation took place?—A. Probably a Code Authority meeting.

Q. Any discussion except at the Code Authority meetings?—A. No.

Q. Were any of those discussions with respect to the price of insulation board carried on in connection with the negotiation of this contract of October 10, 1933?—A. No.

Q. Did you ever suggest to Mr. Dahlberg that if you did not reach some understanding on the hardboard situation, that
468 Masonite would cut the prices of insulation board?—A. In all probability. I don't know. I could not answer that. It is a long while ago.

Q. You are not prepared to say now that you did not say that?—A. No. I probably would like to have said it if I did not.

Q. Did you tell Mr. Dahlberg that you were going to execute similar agreements with other companies?—A. I told Mr. Dahlberg that whatever other companies came in would all come in on the same general agreement.

Q. Well, did you ever say anything to him which would have suggested to him that you were going to make contracts with other companies?—A. Well, that I can't answer at this time. It was part of that agreement, however, that if we did make any agreements with other companies, that they would be on the same terms and general conditions as his contract, and if we made any more advantageous agreement with them, he would benefit by that. I think that is right in the agreement itself.

Q. But you don't recall that you said to him that you were going to make a similar agreement with any other specific company?—A. I did not; no.

Q. Or any group of companies?—A. No; I don't think so. We had no way of knowing at that time.

Q. What was the Insulation Board Institute, Mr. Gillies?—A. The Insulation Board Institute was a group of manufacturers and/or agents, manufacturers' agents or the agents for the distribution of insulation board, building board.

Q. Am I to understand from your answer that its membership included both those who manufactured insulation board and those who simply handled it as agents; is that correct?—A. Yes; and those who manufactured it and distributed it.

Q. And distributed it?—A. Yes; that is right.

469 Q. Do you now recall whether you ever told Mr. Dahlberg in 1933 that you were going to make similar contracts with any member of the Insulation Institute who wished to make such an agreement with you?—A. I probably told him we would be open to anybody who wanted a contract. That was what we certainly intended to do.

Q. Well, did you tell him it would be open to anyone who was a member of the Insulation Institute?—A. I don't know that it was specifically that; no.

Q. You are prepared to say now that you did not say that to him?—A. No.

Q. You just don't remember?—A. I don't remember.

Q. Do you recall whether you made a statement of that kind to the representatives of any other company besides Celotex in connection with the negotiations of these agreements, and by a statement of that kind I mean a statement that you would confine the contracts to members of the Insulation Institute?—A. You mean that we would confine the contract to them?

Q. Yes.—A. Not that I remember. I know that it was available to all of them, but whether exclusively to them, I cannot say. As a matter of fact, there were other people distributing the hardboard at a later date who were not members of the Insulation Institute. The American Gypsum Company is one of them.

Q. That was subsequent to 1933?—A. It was right about that time.

Q. Do you recall whether the Masonite Corporation ever refused to make an agreement of this kind with any company that asked for one, while you were associated with the company?

Mr. TUTTLE. May I have that question.

(Question read.)

470 Mr. TUTTLE. I object to that, your Honor, as immaterial. It seems to be of no moment.

The COURT. I will let him testify if he knows. I don't see how it can harm you.

The WITNESS. I don't remember that that was the case, Judge.

The COURT. I thought you would say that.

Q. You don't remember whether they ever refused to make a contract; is that right?—A. I don't remember any case where we did.

Q. You just can't say whether they did or did not; is that right?—A. Yes.

The COURT. You were looking for business?

The WITNESS. We were looking for business.

The COURT. Distribution?

The WITNESS. Distribution, and plenty of it.

Q. After October 10, 1933, when the agreement was signed between Masonite and Celotex, the stipulation sets forth that similar agreements were made with other companies. You recall that circumstance, I suppose?—A. Yes.

Q. Did you take part in the negotiations which preceded the making of those agreements?—A. I did.

Q. Do you recall now whether you told the representatives of the companies with whom you negotiated that you had a similar agreement with Celotex?—A. In all probability, surely.

Q. Do you recall now whether, when you negotiated those agreements, you told the representatives of the other companies that you were making similar agreements with other companies besides Celotex?—A. Probably.

Q. Do you recall whether the Celotex agreement was
471 printed after it was executed, or before it was executed?—A. I think the first copies were mimeographed and later it was printed.

Q. In your negotiations with the representative of the other companies, did you show them copies of that Celotex agreement?—A. The agreements were all the same.

Q. I realize that, Mr. Gillies.—A. It was a printed agreement.

Q. It was one printed agreement?—A. That is right.

Q. With just space for different signatures; is that right?—A. It was a uniform agreement; yes.

Q. Were you familiar with the method of delivering hardboard to the agents of Masonite?—A. Naturally. Certainly.

Q. Was the hardboard delivered wrapped or unwrapped, do you recall?—A. Hardboard was delivered in many cases wrapped, and in some cases unwrapped.

Q. Mr. Gillies, you testified at the beginning of your testimony that it was part of your regular duties to send notices to the del credere agents of Masonite with respect to the interpretation and operation of the contract. Do you remember that?

Mr. TUTTLE. You are getting so close to the witness I can't hear you.

Mr. Cox. I am sorry. Will somebody read that?

(Question read.)

A. Yes.

Mr. Cox. Mark this for identification.

(Marked "Government's Exhibit 5" for identification.)

472 By Mr. Cox:

Q. Mr. Gillies, I hand you photostatic copy of a document which purports to bear your signature, and I ask you if that was one of the notices you sent to the Del Credere agent?—A. That is right.

Mr. Cox. I offer this in evidence.

Mr. TUTTLE. Your Honor, I don't see its relevancy. It simply relates to an agreement we made as patent holders; they agreed to it as our agents and this shows we held them to the bargain.

Mr. Cox. It is interesting in one respect, your Honor, because it required——

The COURT. The objection is overruled.

(Marked "Government's Exhibit 5" in evidence.)

Q. Do you now recall, Mr. Gillies, whether you took any steps in addition to sending these notices for the purpose of requiring the agents to collect wrapping charges on hardboard which they wrapped?—A. No. We required them to take any steps that we ourselves took.

Q. Do you know where the agents got the paper that they wrapped the hardboard in?—A. In all probability we wrapped it for them.

Q. In some cases they wrapped it themselves, did they not, Mr. Gillies?—A. I don't believe so.

Q. As far as you know, it was always wrapped by Masonite and delivered wrapped to the agents, is that correct?—A. No.

Q. When was it wrapped?—A. When it was wrapped, we wrapped it, as far as I know.

Q. Mr. Gillies, there is reference in the stipulation to
473 the fact that hardboard is often sold in mixed car lots with insulation board; are you familiar with that practice in the industry?—A. That is what we had to offer these agents.

Q. While you were with the Masonite Corporation, can you give us any estimate as to how much of the hardboard Masonite was sold in such mixed car lots?—A. Practically all of it.

Mr. Cox. Will you mark this for identification.

(Marked "Government's Exhibit 6" for identification.)

Q. I hand you what purports to be a photostatic copy of a document which bears your signature and is headed, "Notice to all agents," and ask you if it is a notice which you sent to all of the Del Credere agents?

Mr. EWING. May we have the date?

Mr. Cox. The date is December 24, 1934, and the document has been marked Government's Exhibit 6 for identification. Will you read the question.

(Question read.)—A. Yes.

Mr. Cox. I offer this in evidence.

Mr. TUTTLE. No objection.

(Government's Exhibit 6 for identification received in evidence.)

Mr. Cox. If your Honor wishes to rise at four-fifteen, because I cannot finish at four-thirty, shall we suspend now?

The COURT. I was about to rise at four-fifteen. We will adjourn until ten-thirty tomorrow morning.

(Adjourned to April 24, 1941, at 10:30 a. m.)

474 NEW YORK, *April 24, 1941, 10:30 a. m.*

TRIAL RESUMED

Mr. Cox. Before I resume examining the witness again this morning, I think it might be of interest to your Honor if I should say that this morning I made some proposals to counsel for the defendants, which they, with that spirit of cooperation which they have shown throughout this litigation, have consented to act upon them if they can, and if these proposals are accepted, it will appreciably shorten the taking of oral testimony in this case. That is a bit of pleasant news which I thought you would like to hear.

The COURT. If they will act upon it.

Mr. Cox. I feel confident that they will.

The COURT. If so, it might knock out at least a year of the testimony.

Mr. Cox. I hope your Honor won't press me on that.

Mr. QUARLES. I assure you we will cooperate.

JAMES P. GILLIES, resumed the stand,

Direct examination by Mr. Cox (continued):

Q. Mr. Gillies, you recall that you testified yesterday that you were familiar with the physical characteristics of the board which the Insulite Company was selling in 1933?—A. That is right.

475 Q. Do you know now whether that board was a fiber board product with a weight of from approximately 30 to 60 pounds per cubic foot, or higher?—A. It was.

Q. You also recall you testified yesterday that immediately after or shortly after the decision of the Circuit Court of Appeals in July 1933, there were conversations between you and representatives of the Celotex Company with respect to some contractual arrangements, do you remember that testimony?—A. That is right.

Q. From the period of time or throughout the period of time from July 1933 to October 1933, did you have any conversations with anyone else except representatives of the Celotex Company about a contractual arrangement of any kind?—A. Yes.

Q. Do you recall who those persons were?—A. I talked to both Johns-Manville and the Hawaiian Cane Products, I recall.

Q. Do you recall whether you talked to anybody else?—A. Very probably, because everybody wanted this board.

Q. I ask you to look at this list of companies on page 22 of the stipulation, and see if you can recall whether, during that period, you talked to those companies, excepting the ones you have named?

Mr. LAMB. May I ask what period you are referring to?

Mr. Cox. From July 1933 to October of the same year.

A. I probably also talked to all of them, the Wood Conversion and Agasote, Insulite, at various times.

Q. The Armstrong Company, did you talk to them?—A. Oh, yes.

Q. Do you recall whether in that period between July 1933 and August 1933, you sent to any of the companies listed
476 on this page 22 of the stipulation, a copy of the proposed agreement?—A. Not between July and August; no.

Q. Did you between July and October?—A. We did not have this agreement until after the 1st of October—it was within the last part, as I remember, of September or August when we were making this agreement.

Q. When you say "this agreement," you mean the agreement you made with Celotex in October—the agency agreement?—A. The agency agreement; yes.

Q. Is it your present recollection that no form of agreement

was submitted to any of those companies before that?—A. The first agreement that we had was drawn up in the latter part of August.

Q. In the latter part of August?—A. The agency agreement. We were discussing it and drawing it up and formulating it at that time.

Q. After it was drawn up, did you submit it to any of the companies listed on page 22 of the stipulation?—A. I cannot say definitely whether that agreement was submitted but I believe it was.

Q. You think it was submitted?—A. I think it was.

Q. Do you recall to which of the companies it was submitted?—A. As I remember it, the first ones we submitted it to was Armstrong Cork, Johns-Manville and Hawaiian Cane.

Q. That was done prior to October 1933, is that right?—A. I should say definitely; yes.

Mr. Cox. Will you mark this for identification, please?

(Marked "Government's Exhibit 7" for identification.)

477 Q. Mr. Gillies, I hand you Government's Exhibit 7 for identification, which purports to be a photostatic copy of a letter signed by you and addressed to Mr. Harold C. Harvey of Agasote Millboard Company, Trenton, New Jersey, and I ask you whether in fact you wrote that letter and sent it to Mr. Harvey?

Mr. Gossett. What is the date of it?

Mr. Cox. The date is December 28, 1934.

A. That is my letter.

Q. You wrote that letter and sent it to Mr. Harvey?—A. Yes.

Mr. Cox. I am now going to offer this letter in evidence. I offer the entire letter, but so that there can be no mistake as to the basis of the offer I state at this time that I am offering it because of the statement in the first paragraph which reads: "We have, we believe, a lever"——

Mr. Tuttle. Just a moment. Let us have a chance to see the letter.

Mr. Cox. I will short-cut that by saying I offer it on the basis of the first paragraph of the letter, and on the ground that the first paragraph is an admission by Mr. Gillies as the executive vice president and general manager of the Masonite Corporation as to the purpose of the agency arrangement.

The Witness. What was that purpose, please?

Q. Mr. Gillies, if I read the sentence to you Mr. Tuttle will object.—A. Well, in that first paragraph——

478 Mr. Tuttle. Just a moment, please.

The Witness. I like your definition of industry; that is all.

Mr. TUTTLE. We have but one copy of the letter. There are several other counsel.

Mr. COX. All right, I will wait.

Mr. TUTTLE. If the Court please, we object to the letter as immaterial. Also on the ground, from the point of view of admission, that it would be in no way binding on any of the defendants even if it were an admission. I can't see that it contains anything.

The COURT. May I look at it?

(Paper handed to the Court.)

Mr. TUTTLE. The letter is of course addressed to a company which is not a defendant in this case.

The COURT. Objection overruled.

(Government's Exhibit 7 for identification marked in evidence.)

Q. Mr. Gillies, do you recall whether in 1933 or 1934 any del credere agency agreement existing between Masonite and any other person or corporation was cancelled?—A. I don't remember that there was any cancellation.

Mr. LAMB. If the Court please, that seems to call for a conclusion of the witness.

The COURT. He says he has no recollection. That answers your question.

Q. Now, Mr. Gillies, I ask you whether you now know or recollect whether in 1935 any del credere agency contract between Masonite and any other person or corporation was cancelled?

479 Mr. LAMB. I object to that, if your Honor please.

The COURT. Answer yes or no.

A. No.

Q. You have no recollection at the present time?—A. No.

Mr. COX. Will you mark this for identification.

(Marked "Government's Exhibit 8" for identification.)

Q. Mr. Gillies, I am going to hand you now Government's Exhibit 8 for identification, which purports to be a copy of a letter signed by you, addressed to Mr. Harold Knapp of Celotex Company, dated February 6, 1935, and I ask you to read it [handing to witness]. You have read the letter now, Mr. Gillies?—A. That is right.

Q. Does that refresh your recollection as to whether in either 1934 or 1935 a del credere agency contract existing between Masonite and any other person was cancelled?

Mr. LAMB. May we have your definition of what you mean by "any other person"? I haven't seen this letter; I don't know what it is.

Mr. Cox. I will wait until you have had a look at it.

A. I don't remember that there was any——

Q. Wait a minute, Mr. Gillies. You are not supposed to answer the question till Mr. Lamb has had a chance to look at the letter.

Mr. LAMB. May I hear the question, please?

(Question read.)

480 Q. I will amend the question to read: existing between Masonite and any of the companies listed on page 22 of the stipulation of facts.

Mr. LAMB. I would suggest, your Honor, that the question as put calls for a conclusion by implication.

The COURT. All right, the suggestion is noted.

Q. The question is whether it refreshes your recollection, and nothing else, Mr. Gillies. Does it?—A. I don't remember that there was any actual cancellation, to the best of my knowledge. This may have been written more or less as window dressing for the Celotex Company with whom we were in constant bickering, if you please, over what we considered were our perfect rights in every situation.

Q. Do you now recall whether, in fact, you wrote the letter and the attached memorandum which is headed "Notice and Warning" which, together, constituted Government's Exhibit 8 for identification?—A. It is probably mine; yes.

Q. Well, when you say "probably," do you mean to express any doubt that it is yours?—A. My signature is not on it. I can't recognize my signature there.

Q. That is why I ask you.—A. It is apparently my phraseology; yes.

Q. Well, is it your present belief that you wrote this letter and the accompanying document?—A. I would say ordinarily; yes.

Q. Do you recall now to whom you sent this document?—A. I sent it to the Celotex Company.

Q. Do you recall whether you sent it to anyone else?—A. No; I do not.

Q. Are you prepared to say now that you did not send it to anyone else?—A. No.

Q. You just don't remember?—A. I don't remember.

481 Mr. Cox. I now offer in evidence this document, Government's Exhibit 8 for identification, on the ground that the letter and the accompanying document headed "Notice and Warning" is a written construction and interpretation of del credere agency agreement which was prepared by Mr. Gillies as executive vice president and sent to at least one of the del credere agencies. I take it that there is no objection to that.

Mr. TUTTLE. I have not voiced any.

(Government Exhibit 8 for identification received in evidence.)

Q. Mr. Gillies, I call your attention again to page 22 of the stipulation of facts and to the dates after each contract, indicating the date on which the contract was made, and will ask you whether at any time subsequent to the first of those dates, which was October 10, 1933, until you left the Masonite Company, you took any steps to ascertain whether the companies whose names are on that list were, in fact, selling all of their hardboard at the prices prescribed by Masonite?—A. Certainly.

Q. What were those steps?—A. We had our own salesmen investigate different spots in the country where we had reports that there were violations, where we were being undersold on our own patent product, and as I remember it, we also made arrangements with the Pinkerton Agency to give us reports.

Q. Did you receive reports that in instances the del credere agents were selling at less than the prices fixed by Masonite?—A. We received reports from our own salesmen, but so far as I can remember, there were no violations—no fixed violations.

482 Q. Mr. Gillies, what is the practice of pooling in connection with the sales of hardboard? Does the phrase "pooling" mean anything to you?—A. There are certain established freight rates on various commodities and those freight rates are based upon either bulk or weight. Pooling consists of consigning a carload to one dealer out of which other dealers would acquire a certain proportion of that shipment, the idea being that the entire shipment could be carried at the carload rate.

Q. Now, you recall, do you not, that the price lists of Masonite which are in evidence here, and I mean the price lists for the period between 1933 and 1935, contained one price for a carload lot of hardboard and a higher price for less than carload lots?—A. Right.

Q. Do you recall whether you ever took any steps to ascertain whether the del credere agents would adhere to that particular part of the price list with respect to carload rates and less than carload rates?—A. Naturally.

Q. Do you recall any specific instance in which you took steps to ascertain what the practice of any of the del credere agent was with respect to that?—A. I don't recall any specific instance of what steps I took but I was on the job all the time.

Mr. Cox. Will you mark this for identification, please?

(Marked "Government's Exhibit 9" for identification.)

Q. I now hand you Government's Exhibit 9 for identification, which purports to be a copy of a letter written by you to Mr. Sterling Peacock, N. W. Ayer & Company, dated May 7, 1935, and I ask you to read it [handing]?—A. Yes.

Q. Does that refresh your recollection as to any particular 483 instance when you investigated the practice of pooling by one of the del credere agents?—A. Yes.

Q. Will you tell us what that instance was; state what happened, in your own words?—A. There wasn't any special instance, it was the general practice in order to enable——

Q. Just tell us what was the practic , please, tell us that?—A. Practice of pooling?

Q. Yes, explain that a little bit; exactly what do you mean by pooling in that connection?—A. You have got two distinct things here. You have got pooling and mixing, and they are two very different things.

Q. I understand that. Tell us about mixing, so we will get that out of the picture.—A. Under the published freight rates by the various railroads, the hardboard and softboard and quarterboard, as we call it, all took the same freight rate, and could be shipped in the same car. That was the advantage which the Masonite Corporation had as patent holders on this hardboard. That enabled us to ship in mixed cars a certain portion of any of these three different commodities, whereas other manufacturers necessarily must ship a complete car of one commodity. Now that shipping advantage was one of the reasons or the main reason why these other members of the softboard industry wanted the advantage which we had, because none of them had enough dealers in any one location to be able to ship a car which would be available to more than one or two dealers. It was the practice of the industry to pay the freight and the prices were all delivered prices. Consequently any increased freight came out of the pocket of the agent or the seller.

Q. What you have described so far was mixed cars?—A. Mixed cars. Now pooling would consist of shipping a carload to more than one consignee, and that could be a mixed car or it could be a complete car.

484 Q. Now at what rate or at what price, as shown in the price list, would the pooled car be shipped to the one consignee? The carload rate, or the less-than-carload rate?—A. If it was a full car it would be at the carload rate. If it was a mixed car it would be at the carload rate.

Q. Now return to the specific practice that you were going to describe on the basis of your refreshed recollection. Will you tell us now what that specific practice was that caused you to conduct an investigation?—A. The practice of pooling would be to ship a carload of material, either mixed or complete, to one consignee and make the shipments in that car available to other dealers.

Q. And that shipment would be at the carload rate?—A. The shipment would be at the carload rate.

Q. Had you received reports that this practice was being indulged in the industry?—A. We had. As far as our own

material was concerned we could not sustain them, as I remember.

Q. Did you take any steps to investigate them?—A. We tried to find—we tried, to the best of our ability, and we could never get any proof that that was the practice.

Q. Who was Mr. Sterling Peacock?—A. He was a vice president of our advertising agency, N. W. Ayer Company.

Q. Mr. Gillies, yesterday you testified that you talked to representatives of the Insulite Corporation prior to the execution of the agreements which are referred to on page 22 of the stipulation. Do you recall that testimony?—A. Naturally.

Q. Do you recall the names of the persons representing Insulite with whom you talked at any time between 1932 and 1935?—A. Well, I talked to their general manager. I can't recall his name at the moment.

Q. Did you talk to anyone else?—A. I went up to Insulite and saw everybody up there at the time I was there.

Q. Do you now recall talking to Mr. C. T. Jaffrey?—
485 A. Mr. Jaffrey was one of the receivers of the Ontario Paper Company who in turn controlled the Insulite Company.

Q. I now ask you whether you ever talked to him?—A. Yes, indeed.

Q. Did you ever talk to Mr. R. H. M. Robinson?—A. Yes, he was a co-receiver.

Q. And did you ever talk to Mr. S. M. Archer?—A. I don't recall him.

Q. Do you remember when you talked to Mr. Jaffrey?—A. While I was in Minneapolis.

Q. What year was that? Do you remember?—A. It was probably in 1934.

Q. Do you know how many times you talked to him?—A. Just the once.

Q. Did you talk to Mr. Robinson at the same time?—A. That is right.

Q. And did you then talk to him one time?—A. All the other negotiations were carried on with the underlings, people that were working for the receivers.

Q. Now, Mr. Gillies, from October 1933, until the time you left the Masonite Company, do you know whether Masonite was selling hardboard to wholesalers or dealers who were also buying hardboard from any of the del credere agents?—A. Not to wholesalers or dealers as far as I know.

Q. Well, do you recall now whether the Masonite Company sold any hardboard to anyone who was buying hardboard from

any of the del credere agents listed on page 22 of the stipulation?—A. Probably some of the different reserves.

Q. I think, although it is in the definitions set forth in the contracts, so that it is not necessary, it might be useful if you will tell the Judge what a reserve is, so that that statement will be a little more intelligible.—A. A reserve is more or less
486 a cooperative purchasing group who would appoint a manager and warehouse the different products of different manufacturers so that they would be available for the yard itself. There might be as many as 200 yards drawing on the stock of this single reserve.

Q. Do you know whether, throughout that same period of time, to wit, from 1933 until you left the Masonite Company, the salesmen of the Masonite Company solicited orders for hardboard from any dealers who were buying from the del credere agents listed on page 42 of the stipulation?—A. Why, of course.

Q. And did they solicit orders from wholesalers who were buying from the del credere agents listed on page 22 of the stipulation?—A. We were after all the business we could get.

Q. Now, Mr. Gillies, I call your attention to paragraph 53 of the stipulation of facts, and particularly to the first sentence in that paragraph, which I will ask you to read [handing to witness].—A. Yes.

Q. You testified yesterday that after the decision of the Circuit Court of Appeals, in July 1933, you discussed with other officers of the company the steps which the company should next take in connection with the distribution of hardboard. Do you recall that testimony?—A. That is right.

Q. Now, do you recall at about what time you first heard the suggestion that Masonite should designate other corporations as its agents for the distribution of hardboard?—A. I did not hear it; I made it.

Q. You made it?—A. That is right.

Q. When did you make it, Mr. Gillies, for the first time?—A. Very shortly after our patent was validated.

Q. That is, shortly after July 1933?—A. That is right.

Q. And that suggestion had not been made prior to that time; is that correct?—A. That is right.

Q. The negotiations you described yesterday with other companies, then, prior to that time, were not negotiations
487 for agency agreements; is that correct?—A. That is right.

Q. And the proposal that the hardboard be distributed through agents was discussed by you with the other officers of the Masonite Corporation?—A. That is right.

Q. Did you discuss it with anyone else, except the members of the executive committee and the officers, who was associated with Masonite in any way?—A. With our own salesmen.

Q. With your own salesmen; with anyone else?—A. Not that I recall.

Q. Did you discuss it with counsel?—A. Oh, yes; we talked with counsel.

Q. Do you know whether, in those discussions with counsel, anything at all was said about the subject of price?

Mr. TUTTLE. If the Court please, I don't know what Mr. Cox has in mind, but it seems to me that I ought to impose the objection of privilege.

Mr. Cox. I think perhaps Mr. Tuttle has a point as to any oral testimony on the point, but I have a letter here which I will argue amounts to a waiver of privilege, as to which I wish to interrogate the witness.

Mr. TUTTLE. Very well. Suppose you pursue that course.

Mr. Cox. Mark this, please.

(Marked "Government's Exhibit 10" for identification.)

Mr. Cox. Now I will withdraw the question which is on the book and ask you another question, Mr. Gillies.

Q. Prior to July 1933, you have testified that you carried on conversations with certain companies with respect to patent license agreements, as distinguished from agency agreements; is that correct?—A. Correct.

488

Q. And did you discuss those proposed arrangements with with officers of the Masonite Corporation?—A. I did.

Q. And did you discuss those proposed arrangements with counsel for the Masonite? I just want a yes or no answer.—A. Yes.

Q. Do you recall whether you received any advice from counsel with respect to what might legally be put in such a patent licensing agreement with respect to price?—A. Yes.

Q. I hand you now Government's Exhibit 10 for identification which purports to be a photostatic copy of a letter from H. H. Dyke to you, Mr. Gillies, dated September 13, 1932, and I ask you whether you received that letter in fact?—A. Yes.

Mr. Cox. Mr. Tuttle, have you seen Government's Exhibit 10 for identification?

Mr. TUTTLE. Yes; I have just seen a copy of it.

Mr. Cox. I now ask you whether you care to answer the question, whether there is any question that this letter in fact was written by Mr. Dyke?

Mr. TUTTLE. Not at all.

Mr. Cox. I now offer this letter on the ground that the letter

shows that this defendant was advised by counsel in 1932, that it could not——

Mr. TUTTLE. I object to any statement by counsel trying to summarize the letter. Here is the letter being shown to the Court——

The COURT. I think it would be better if you did not state the grounds of your offer unless somebody challenges it.

489 Mr. TUTTLE. I wish to make the following objection: first, it is a privileged communication. In the second place, it is obviously immaterial. It relates to a possible transaction which never eventualized into anything, written way back in 1932, and paragraph 39 of the stipulation covers all of that matter. Furthermore, I cannot see in any event that we could be bound by the opinion of counsel as to the law. Even the most eminent counsel finds himself mistaken on occasion, and Mr. Dyke is in that class, and I know he won't be put out if I say that some of us think he might have been mistaken in that opinion.

Mr. COX. I don't think he was.

Mr. TUTTLE. I think it is all immaterial and not binding on anybody.

The COURT. I sustain the objection to its admission.

Mr. COX. I don't want to argue it, your Honor, but I want to make it plain that I do not offer this document as binding on anybody but to show that the Masonite Company knew when it made the agreements in 1933 and 1935 that one provision of those agreements was probably illegal under the anti-trust law.

Mr. TUTTLE. I object to that statement.

The WITNESS. May I say something?

Mr. COX. I am just stating what I am offering it for.

Mr. TUTTLE. I don't agree with the comment.

Mr. COX. I don't expect you to. It isn't evidence.

The WITNESS. May I state something, your Honor?

The COURT. No; I think you had better not. We will have enough talk in this case anyhow.

490 Mr. COX. Will you mark this for identification, please.

(Marked "Government's Exhibit 11" for identification.)

The COURT. I suppose you want to get back somewhere. Where do you live, Chicago?

The WITNESS. No, I live in Rye.

The COURT. Then we want to get you back to Rye.

Q. Mr. Gillies, I want you to look at Government's Exhibit 11 for identification which purports to be a photostatic copy of a letter written by you to J. B. Faegre, dated February 5, 1935, and ask you whether in fact you wrote that letter?—A. It is very illegible, but I wrote it.

Mr. COX. Will you mark this for identification?

(Marked "Government's Exhibit 12" for identification.)

Q. I now hand you what purports to be a photostatic copy of a letter written by you to Mr. Dyke, dated September 18, 1933, and ask you whether in fact you wrote that letter?—A. I did.

Q. Very well. I now show you a document which is headed "Memorandum to All Agents of the Masonite Corporation," which purports to be signed by you and which is dated June 1, 1934——

Mr. Cox. Will you mark this for identification?

(Marked "Government's Exhibit 13" for identification.)

491 Q. (Continuing.) Will you look at this?—A. I did.

Q. Did you in fact write that letter?—A. Yes.

Q. Did you send it to all the del credere agents of the Masonite Corporation?—A. In all probability.

Q. When you say in all probability, do you mean to express any doubt about it?—A. It was certainly the intention to send it to all of them.

Q. Do you think now you did send it to all of them?—A. I do; yes.

Mr. Cox. I offer this in evidence.

Mr. TUTTLE. I suppose, Mr. Cox, that there is no objection on your part to agreeing that this paper you are now offering refers to our hardboard?

Mr. Cox. I take it that it does, yes.

Mr. TUTTLE. And to that alone?

Mr. Cox. No objection, I understand.

Mr. TUTTLE. With that understanding no objection.

(Government's Exhibit 13 for identification marked in evidence.)

Mr. Cox. At this time I wish to renew my offer of Government's Exhibit 2 for identification, which is a letter written by Mr. Gillies to Harold C. Harvey, president of the Agasote Millboard Company, dated December 6, 1933. I offer it again, as I did yesterday, on the ground that the last paragraph of the letter is an admission by Mr. Gillies.

Mr. TUTTLE. I object to that. Your Honor sustained the objection yesterday. I think it is merely an expression of an opinion by Mr. Gillies, if it is anything at all, and could not in any way be binding on any defendant in this case.

492 The COURT. I will receive it at this time.

(Government's Exhibit 2 for identification marked in evidence.)

Mr. Cox. Will you mark this for identification?

(Marked "Government's Exhibit 14" for identification.)

Q. Now, Mr. Gillies, I hand you a document which purports to be a photostatic copy of a letter addressed by you to Mr. Ben Anderson, dated April 4, 1935, and I ask you whether in fact you wrote this letter?—A. That is right.

Q. You did write that letter?—A. Yes.

Q. Who is Ben Anderson?—A. He was our comptroller at Laurel.

Mr. Cox. I offer this letter, on the ground that the second paragraph is an admission by Mr. Gillies.

Mr. TUTTLE. Just a moment, please. If your Honor please, I object to this as immaterial and not binding on the Masonite Corporation. It is a mere expression of his personal viewpoint as to whether or not a contract should be made with others than a given class. As a matter of fact, the statement shows that a contract was made with Hawaiian Company in which the Certain-Teed was in part an assignee, and that a contract was subsequently made with the Certain-Teed itself.

The COURT. I will take it for what it is worth.

Mr. LAMB. May we also, your Honor, note an exception to documents of this character on behalf of other defendants, on the ground that it is not binding on the other defendants,
493 being only a communication intended as an admission against Masonite Corporation.

The COURT. Very well.

Mr. LAMB. I assume it is not necessary to repeat objections on that ground.

Mr. Cox. No, I won't——

The COURT. No.

(Government's Exhibit 14 for identification marked in evidence.)

Mr. Cox. Will you mark this for identification? This is a letter of October 16, 1933.

(Marked "Government Exhibit 15" for identification.)

Q. Now, Mr. Gillies, I hand you a document which purports to be a photostatic copy of a letter addressed by you to Mr. Darrell Boyd, dated October 16, 1933, and I ask you to read it and tell me whether you in fact wrote that letter?—A. Yes.

Q. You did write the letter?—A. I did.

Mr. Cox. I now offer Government's Exhibit 15 for identification, on the ground that the first sentence of the second paragraph is an admission by Mr. Gillies.

Mr. LAMB. Is this, may I ask, the letter of October 16, 1933, now being offered in evidence?

Mr. Cox. Yes, that is the short letter to Boyd.

Mr. LAMB. May I read it just a minute?

Mr. Cox. Certainly.

Mr. LEWIS. No objection.

494 (Government's Exhibit 15 for identification received in evidence.)

Mr. Cox. Will you mark this for identification, please?

(Marked "Government's Exhibit 16" for identification.)

Q. Mr. Gillies, I hand you what purports to be a photostatic copy of a letter written by you to Mr. H. H. Dyke, and dated April 7, 1932, and ask you to look at it and tell me whether, in fact, you wrote the letter?—A. Yes.

Q. You did write that letter to Mr. Dyke; is that correct?—A. Correct.

Mr. Cox. I offer this letter, on the ground that the first paragraph on the second page is an admission by Mr. Gillies.

Mr. TUTTLE. If your Honor please, I feel that I should, as a matter of principle, object to the Government putting in letters from a corporation or its officers to its attorney, on the ground of confidential communication. I don't believe the Government should undertake to invade that privilege because we assert it, and it doesn't show any interest against us.

Mr. Cox. I assume the document is not confidential now. It was given to us voluntarily.

Mr. TUTTLE. Well, the United States Government walked in and possessed itself of our files. I don't see that that in any way waives privilege.

Mr. Cox. Mr. Tuttle, I think that is pointless to argue about, but that is not what I understand the situation was. No subpoena was served, I understand.

495 Mr. TUTTLE. I understand that when permission of that kind was given, if it were permission as distinguished from a demand by the Government, that nevertheless it is all subject to such objections as may be made. In common fairness, does the Government want to adopt a policy otherwise? I think if that were announced, its investigations would be very much hampered.

Mr. Cox. No. I think, as a matter of fact, they tell people that any privilege of any kind should be asserted initially. That is always my understanding.

Mr. TUTTLE. Well, I was not party to it and I don't believe you were, so I see here a letter to counsel and I am asserting privilege.

The COURT. Let me see the document.

Mr. TUTTLE. It is not so much, your Honor, in connection with this particular letter as in connection with the principle.

The COURT. What is the paragraph?

Mr. Cox. The first paragraph on the second page.

The COURT. I will sustain the objection, not on the ground

asserted by Mr. Tuttle, but on the general objection that it is incompetent, irrelevant and immaterial.

By Mr. Cox:

Q. Mr. Gillies, you have testified that before July 1933 you discussed proposed licensing arrangements with other officers of the Masonite Corporation. Do you recall that testimony?—A. Right.

Q. Do you recall now whether there were conversations of that kind in 1932?—A. On an "if and when" basis.

Q. I am not sure I understand that. You mean there may have been some conversations?—A. No; I mean that we in
496 all probability talked about this question of licensing if we got a patent which was valid, when we got it.

Q. When you got it. Do you recall anything that was said in those conversations more definitely than your last statement?—A. No; I do not.

Q. Now I hand you Government's Exhibit 16 for identification and I will ask you to look at the first paragraph at the top of the second page, and ask you whether that refreshes your recollection in any way. I just want a yes or no answer. Does it refresh your recollection?—A. Yes.

Q. What is your present recollection as to what was said in those conferences?

Mr. TUTTLE. I object to that.

The COURT. Sustained. You have got everything that you need in so far as these preliminary investigations and conferences are concerned and the admission of counsel in the opening. It stands to reason that after the decision by Judge Nields that there were discussions between officers of the company and other people and I suppose in reference to licenses and contracts and what they were going to do.

Mr. COX. This line of inquiry, your Honor, is——

The COURT. Well, after all, it really starts from October 10, 1933, on the basis of the decision of the Circuit Court of Appeals which sustained the patent, and I suppose they did not sustain all the claims, but only some of them, and held that the patent was infringed, and then you have an agreement on that basis. Outside of the background for the agreement, which I think is already in the case, I should doubt very much whether you are going to get a great deal by probing his mind and the minds of all of the other persons to see what suggestions they made, law-
497 less or otherwise. I am not intimating at all that there were any lawless suggestions; I simply made that remark I think only in a sense of comparison.

Mr. Cox. I assume that. I shall have just one more question, and then I will abandon it.

Q. Now I ask you, Mr. Gillies, whether you now recall any more definitely what was said in those conversations than you did when you said they were conducted on a when, as and if basis?

Mr. TUTTLE. I object to it as immaterial, your Honor. That is back in 1932. The stipulation states what became of it.

The COURT. I will sustain the objection.

Mr. Cox. Very well. I think I shall make an offer of proof that if the witness were permitted to answer the question he would testify that he discussed with Mr. Alexander, among others, the working out of a proper code of ethics for the synthetic wood industry.

Now, if your Honor please, if I may consult my notes a minute, I believe I shall have finished with this witness.

The COURT. All right. We will take a recess while you do so.

(Short recess.)

Mr. Cox. I have concluded my direct examination of the witness.

Cross-examination by Mr. TUTTLE:

Q. Mr. Gillies, I would like to ask a few questions. I understand that these del credere agreements made during
498 the period you have mentioned, with the Masonite Corporation, were all in the same form?—A. Yes, sir.

Q. The terms and conditions and the mutual undertakings were identical substantially?—A. Yes, sir.

Q. A printed form was used?—A. That is right.

Q. It was the policy, therefore, of the Masonite Corporation to extend the same opportunity to all comers who could show that they could give distribution on a responsible basis?—A. Yes, sir.

Q. And do I understand from what you said to Mr. Cox, that that policy on the part of the Masonite Corporation in the making of these opportunities available to all, was told? You made no secret of it?—A. That is right.

Q. In fact there was a provision in these agreements, looking to the extension to all who might come thereafter of the same benefits that came under that agreement?—A. Yes.

Q. You were asked with reference to Plaintiff's Exhibit 2, a letter written by you under date of December 6, 1933, concerning the final paragraph in that letter. I understood you to say, in answer to Mr. Cox's question, that an objective, and a large objective to the Masonite Corporation in making these agreements, was to extend distribution facilities for hardboard, your patented product; is that right?—A. Those were our main objectives; yes.

Q. And in consequence, was it the desire and purpose of your company at the time that this letter was written, to obtain those

facilities from as many companies as had facilities of that character to offer?—A. Yes, sir.

Q. And to obtain those facilities all on the same terms—the same uniform terms?—A. Yes, sir.

Q. Can you tell me whether or not it was that policy that you had in mind is your expressions in this final paragraph in Plaintiff's Exhibit 2?

499 Mr. Cox. I object to that.

The Court. Overruled.

A. Do I have to answer that yes or no?

Q. You can answer it with such explanations as you see fit to make.—A. The Insulite Company were making a board by a different method. It was an inferior board which in our own estimation, was hurting the distribution of hardboard, because it was subgrade board. It was our desire to get into the hardboard market a board of absolute uniform quality, and that was the one reason why, in making these agency agreements, we withheld from all agents anything except top-grade board.

Q. You mean that was one of the reasons why you reserved to the Masonite Corporation what was called the industrial business?—A. Yes, sir.

Q. And that leads me to ask you to explain to the Court a little more at length, just what this industrial field was and how it differed from the building field to which the agents were permitted to sell under these agency agreements?—A. Judge, in the manufacture of this product, it was necessary to make a board which was four feet wide and twelve feet long. About 63 percent of our sales to the building industry, as I remember the figures, were in 8-foot lengths which left us in cases of those sales with a 4 x 4 piece of board. In addition to that, in this process of ours, and especially when we were first getting going, we had a considerable proportion of subgrade board. In the building industry, most of the boards that we manufactured were exposed; on the other hand, where the board was used as a base, as a processed piece by manufacturers, they could use cut-ups in small pieces and they could also use boards which were subgrade in appearance, be cause of the fact that it was covered, or wasn't in evidence

500 in the finished product. And we had to reserve this manufacturing market in order to get rid of the shorts which we had accumulated and also of the off-grade material. We had to have a market for it.

Q. If subgrade boards had been turned over to agents for sale, was it or was it not the viewpoint of your company that you would lose control over the use of such boards, and there might be confusion and loss of goodwill?—A. We were introducing a product to the market, and we were absolutely depend-

ent upon the public reception of that product, and we were extremely jealous to see that the public itself got nothing but the highest grade board we could offer.

Q. And that was the character of the board, the grade of the board that you felt should go to the building industry for the purposes of uniformity and proper public reception?—A. Yes, sir.

Q. Now at the time you wrote this letter of December 6, 1933, there was what you say—what you called an inferior board being put out by the Insulite Company?—A. Yes, sir.

Q. And subsequently did your company bring against the Insulite Company—well, the Faxon Lumber Company, which was a dealer for the Insulite Company—an infringement suit, as referred to in the stipulation of facts here?—A. Yes, sir.

Q. And that infringement suit was, as referred to in the stipulation of facts, subsequently compromised with the approval of the court that had charge of the receiver of the parent company of the Insulite Company?—A. Yes, sir.

Q. And as a result the agency agreement in the same form came to be made with the Insulite Company?—A. Yes, sir.

Q. Can you tell me whether by that means the result
501 which you contemplated in Government's Exhibit 2, the last paragraph, to wit, the preservation of a uniform board of high grade in connection with your business was accomplished and preserved?

Mr. Cox. I object to that. The characterization of the last paragraph is inconsistent with the evidence.

The Court. I will let him testify in his own language what the result of it was, if he knows.

A. The inferior board was removed from the domestic market, that is from the United States market.

Mr. Tuttle. Dealing with these exhibits that have been offered by Mr. Cox, I have in hand Plaintiff's Exhibit 9 for identification, which was not offered by Mr. Cox in evidence, but interrogation was made of the witness about it, and I would now like to offer it in evidence.

The Court. All right.

Mr. Cox. No objection.

(Marked "Defendants' Exhibit A.")

Q. Is that letter a fair illustration of the policing efforts which you made in order to secure observance of this policing program uniformly?—A. As I remember it this was the only case in which we asked this agency for assistance. It is a fair example; yes.

Q. And it contains reference on the second page of a policing program by you of the Celotex Company? Do you observe that?—A. Yes, sir.

Q. And can you tell me whether or not at that time, 193[illegible]
502 two years after the contract with Celotex Company was made, you were from the point of view of the observance of the contract, dealing with them at arm's length?—A. Yes, sir.

Q. Now on the first page, at the bottom, this Defendants' Exhibit A states, with reference to the pooling practice to which the paragraph is directed, "We have no control over this practice insofar as the insulation or softboard is concerned." Will you tell me why that was so?—A. Well, our patented product was hardboard.

Q. This insulation board, or softboard, was not a patented product?—A. Our contract referred only to hardboard.

Q. In other words, insulation board was not in the terms of the contract?—A. No, sir.

Q. Furthermore, is it not a fact that in 1933, and for some years prior thereto and ever since, insulation board as an unpatented product has been made in various forms by various companies throughout the United States?—A. And of various materials; yes, sir.

Q. And of various materials. And those various makes of insulation board have from the time prior to 1933 and since been in competition with each other for patronage in the building industry?—A. Yes, sir.

Q. And at the time this agreement was made, the one with Celotex on October 10, 1933, you were the only company on the day before that contract was made, we will say, who could send out commercially in the carload lot a carload that would be both insulation board and hardboard?—A. With the exception of Insulite.

Q. Well, I don't want to get into the question of whether Insulite was infringing your particular product or not, but taking your patented product as the basic hardboard you were the only company that could supply that hardboard in carload lots?—A. Yes.

Mr. Cox. I object to that.

503 The COURT. Well that is so, is it not?

Mr. Cox. That is not my view of the circumstance, but he has answered the question.

The COURT. Well, I assume that the Masonite Company had a patent monopoly on hardboard and nobody else could supply hardboard in the same car with softboard.

Mr. Cox. That is so; but it is our position, your Honor, that the hardboard or the board made by Insulite and by Celotex perhaps did infringe the patent. As to that, I take no position. But it was substantially the same physically is our position.

The COURT. I understand the point.

Mr. TUTTLE. Well, it was for that reason that it infringed.

By Mr. TUTTLE:

Q. Now, just to put it briefly and in a sentence, because I think there is no dispute about that, the agreements made with these del credere agents, from the point of view of the del credere agent, gave them the advantage of being able to do likewise, an advantage which otherwise they did not have?—A. That is why they wanted the agreement.

Q. Yes; and after that agreement of that character——

Mr. Cox. I move to strike out that last answer on the ground that it is not responsive and on the additional ground it is a conclusion of the witness as to the state of mind of someone else.

The COURT. On the statement that it was his understanding or conclusion, I don't see that you need worry about it. You may be able to show that his conclusion is incorrect.

504 Q. And after the initial agreement of this character was made with the Celotex, then is it the fact that the others who are competitors of the Celotex Company in the distribution of building materials generally wanted to have the same privilege?—A. Yes, sir.

Q. And approached Masonite for the purpose?—A. Yes, sir.

Q. Can you tell me, as of October 10, 1933, how many dealers there were in the United States dealing at retail in building materials?—A. By 1933 there had been a terrific mortality of dealers, but there were still, as I recall it, over 20,000.

Q. The number had gone down because of the depression?—A. Yes, sir.

Q. Shortly before the full force of the depression struck, how many were there?—A. There were considerably more than that. The figure that is in my mind is around 27,000.

Q. And at the time when there were 27,000 of those dealers, and before the agreement with Celotex was made; how many of such dealers had become direct dealers by agreement with the Masonite Corporation itself? In other words, how many dealers did you have out of the 27,000, if you recall?

Mr. Cox. What period of time?

Mr. TUTTLE. Before the Celotex agreement.

A. We had a very few dealers comparatively. We were operating on a selective dealer basis because we could not do anything else. We would get the best dealer that we could in a town if he was not sewed up by somebody else, and if we could not get the best one, we would get the next best one, and so on down the line, until we took who we could get. I would say that we had around 3,000 over the entire United States.

505 Q. Well now, 27,000, or take it at that time, October 10, 1933; in all something over 20,000 dealers, of those 20,000-plus, how many were included in relationships with the various del credere agents?—A. Practically all of them.

Mr. TUTTLE. I conclude.

The COURT. Does anybody else wish to cross examine?

Mr. LAMB. No cross.

Mr. COX. I have a few questions.

Mr. TUTTLE. Perhaps, if you will permit, I have a paper placed before me which suggests one question that I overlooked.

Mr. COX. Very well.

By Mr. TUTTLE:

Q. I am now referring to Plaintiff's Exhibit 7, a letter by the witness to Mr. Harvey of Agasote Millboard Company. There is a reference as of that date, to wit, December 28, 1934, to the Insulation Board Code. At that time the NRA was in effect?—A. Yes, sir.

Q. And the various industries were, pursuant to the policy of that statute, preparing codes?—A. Yes, sir.

Q. Or approving them?—A. Yes.

Q. And you have referred to an institute at that time. What subject matters, in the way of building materials, did that institute which you have mentioned cover?—A. The institute was known as the Insulation Board Industry.

Q. And of course, therefore, it related to insulation board?—A. It related to insulation board and kindred products.

Q. Now, when this letter refers to the Insulation Board Code and certain prohibitions therein, what, in a word, was that code, and who made it up?—A. Well, we had frequent meetings among ourselves in an effort to arrive at a code.

506 Q. When you say "we," whom do you mean?—A. The members of the Insulation Board Industry?

Q. Yes.—A. Of manufacturers and distributors of insulation board and kindred products, and we met frequently with various and divers administrators in Washington. We would get a code up and take it down to Washington and meet with the administrator and he would take two or three shots at it and we would go back with the idea of revising it and then go back to Washington and find ourselves with a new administrator, and we would work with him for some time and have the experience repeated.

Q. Well, did this code that you were trying to get through, tentatively deal with the subject of price and other regulations?—A. Oh, yes.

Q. So that was a matter, that code and the making up of it, the terms of it, all a matter of discussion with the Government,

looking to the accomplishment of the policy of the NRA?—A. Yes, sir.

Q. Did you actually get a code approved?—A. No, sir; the NRA was knocked out before our last meeting.

Mr. TUTTLE. No further questions.

Redirect Examination by Mr. COX:

Q. Well, Mr. Gillies, referring again to Plaintiff's Exhibit 7, which is the letter of December 28, 1934, addressed to Mr. Harvey, as to which Mr. Tuttle has just interrogated you, I call your attention to the second sentence in the first paragraph. Just look at that.—A. Yes, sir.

Q. That sentence refers to an agency agreement on hardboard. Now, that was not one of the things you discussed with the code authorities, was it?—A. Yes.

Q. You discussed the agency agreement with the code
507 authorities?—A. Not the agency agreement itself, but hardboard was discussed with them.

Q. But not the agency agreement?—A. No.

Q. Did you ever show a copy of the agency agreement to any code authority of any kind?—A. So far as I know, we did not even have it then. That was prior to October 10th.

Q. That is right. Now I call your attention again, Mr. Gillies, to Plaintiff's Exhibit 2, which is another letter written by you to Mr. Harvey of the Agasote Millboard Company, dated December 6, 1933, and I call your attention to the last paragraph. Do you recall that last paragraph in that letter?—A. Yes.

Q. Now, as I understand it, you have testified on cross examination by Mr. Tuttle that when you wrote that paragraph what you were thinking about was that Insulite was selling an inferior hardboard; is that correct?—A. Correct.

Q. And it was for that reason that you wanted to reach some arrangement with Insulite; is that right?—A. Correct.

Q. Was that the only reason?—A. No.; we wanted their additional capacity of distribution.

Q. Those are two reasons. Now, was there any other reason?—A. No.

Q. Was Insulite selling a hardboard in competition with Masonite at that time?—A. In localized spots; yes.

Q. In some places it was?—A. In small quantities.

Q. Do you know at what prices it was selling its board in comparison with the prices of Masonite?—A. Not of my own knowledge. I know by hearsay that it was somewhat under ours.

Q. Is it now your recollection that that competition was not one of the reasons why you wanted to make an arrangement with Insulite?—A. The competition was only serious in the fact

that it was discrediting hardboard with public. It was never serious as to quantity.

508 Q. You were not disturbed by the fact that they were selling at lower prices than Masonite?—A. They were not selling enough of it to make any difference.

Q. I call your attention, Mr. Gilles, to Exhibit S-57, which is attached to the stipulation of facts, which shows that in 1933 Insulite sold about three million feet of hardboard to dealers. Do you see that figure of sales to dealers, wholesalers, United States Government Agencies?—A. Yes.

Q. Do you still say that those sales were so small in quantity that they were not a matter of concern to you?—A. I do.

Q. Do you know at this time whether Insulite sold the board which it was making—I am speaking of 1933 now—directly to dealers and wholesalers, and I mean all of the board it sold, did it sell directly to dealers and wholesalers or did it sell through any other agency?—A. It sold through the Wood Conversion Company.

Q. Now, you have also testified that at the time you wrote that letter, and I refer to Plaintiff's Exhibit 2, that the chief interest of the Masonite Company was in getting distribution facilities; is that right?—A. Yes.

Q. Was it the desire of the Masonite Company at that time to distribute through these facilities by any one form of contract rather than another?—A. Explain your question.

Q. Well, I will ask you this: Did you ever consider selling hardboard to the companies with whom you made del credere agency agreements?—A. Yes.

Q. Did you ever consider granting them a license under the patent to manufacture themselves?—A. We considered every possible phase.

Q. And after considering all the possible phases, you decided that the agency arrangement was the way you wanted to do it; is that right?—A. That is right.

Q. All right. Now I want to know why you decided to use an agency rather than a sales arrangement?—A. We would

509 never make any arrangement with anybody until after we had a valid patent. Under a valid patent setup, we felt that we had a perfect right to control the price on our own patented products, and under those conditions we use the agency agreement in order to maintain our rights.

Q. By your "rights," you mean the maintenance of the price?—A. The maintenance of the price as long as it was our own material.

Q. That is why you took an agency agreement rather than a

sales agreement?—A. If we had made the sale, we would not have owned the material, we would have lost title to it.

Q. And it was the policy of the Masonite Company at that time, if it could do so within its rights, to maintain the price at which hardboard would be distributed through the companies with whom you concluded these del credere arrangements, is that right?—A. Right.

Q. Now, Mr. Gillies, you testified at this time that a certain percentage of your hardboard was what you called subgrade, that is in 1933, is that right?—A. Yes.

Q. Are you now in position to give us an estimate of how much of the total production was subgrade?—A. That depends on what you mean by subgrade.

Q. What do you mean by it?—A. We are talking now about shorts or so-called cut-off pieces. Every time we sold an 8-foot board we sold two-thirds of it and kept one-third.

Q. Is that what you mean by subgrade?—A. That was part of it. In addition we had board that was inferior in finish, that was rough or had cockles in it.

Q. Take the first kind of board that you spoke of, a piece that was cut from an 8-foot board that resulted in a short, that was not inferior in quality to the rest of the board, was it?—A. It might be. It was not always. In other words, we could take a 12-foot board which had an inferior spot in it and have an 8-foot length left.

510 Q. And if the short lengths which were left were still of the same quality as the best of the board, you regarded it as subgrade because of its size, is that correct?—A. That is right.

Q. Now let us take boards which were defective in quality in some way, finish or otherwise, are you in position to give us an estimate or what percentage those boards bore to your entire production?—A. As we learned the technique of the manufacture, it became less.

Q. Let us start in 1933?—A. In 1933, 40 percent wasn't Class A board.

Q. And that decreased from time to time?—A. As time went on, and as we learned how to do the job, that decreased the subgrade material.

Q. Take the time preceding the time that you left the Masonite Company, what percentage of the board at that time would you say was sub-grade, in the sense that it was defective in its quality?—A. As to finish?

Q. Yes.—A. I would say 25 to 30 percent.

Q. So there had been a 10 or 15 percent drop in the percentage? A. That is right.

Q. Did you sell any grade A board for uses other than the building industries in 1933?—A. To the best of my recollection, no. There may have been a few exceptions.

Q. All of your sales for industrial use at that time were of sub-grade board, is that correct?—A. Yes.

Q. And by the term sub-grade, you mean——A. There would be an exception there, too. Certain of our board which was sold for simulated tile, where the finish was very important, that was always class A board.

Q. That was sold for industrial uses?—A. No; it was sold for processing. It was used for the sides of refrigerators and it was used for the lining of bathrooms as simulated tile or enamel board.

511 Q. Is it proper loosely to refer to a sale for that purpose as a sale for industrial use?—A. Yes.

Q. Was that particular variety of board which was sold for uses as simulated tile, an important, quantitatively, item in relation to your total production?—A. It was a growing demand.

Q. There was a growing demand, and there was a substantial amount of that sold?—A. That is right.

Q. Did that situation change after 1933? To be more precise, was there ever a time when you began to sell a grade for industrial uses while you were connected with the company?—A. Not to the best of my recollection, except with that exception.

Q. When in these last three questions that I have been speaking about grade A board and you have answered that all of the sales for industrial uses were of sub-grade board, am I correct in assuming you include under the term, sub-grade board, shorts, which have no defect except that they are shorter than the normal length?—A. That is right.

Mr. Cox. I think that is all, your Honor.

Recross-Examination by Mr. TUTTLE:

Q. Just two questions. You were asked by Mr. Cox—just bear with me, Mr. Gillies, for two questions—you were asked by Mr. Cox about the quantity of so-called hardboard sold by Insulite in 1933, and you said, and the stipulation said, about three million feet. Turning to Masonite Corporation for the same year, to-wit, 1933, the stipulation says over 45 million feet. Does that accord with your recollection?—A. Yes.

Q. With reference to Plaintiff's Exhibit 7, Mr. Cox having just referred to the second sentence in the letter, the sentence saying:

512 "We have, we believe, a lever in this agency agreement on hardboard which enables us to stabilize the entire industry if properly used."

What product were you referring to in connection with the word "industry"?—A. The hardboard industry.

Mr. TUTTLE. That is all.

Redirect Examination by Mr. Cox:

Q. I had one question which I have forgotten and one which was evoked by the cross examination with respect to your last answer, Mr. Gillies. I ask you now whether it is your positive recollection when you used the words "the entire industry," you meant just the hardboard?—A. The only thing we were interested in was hardboard.

Q. You were also making insulation board and selling it, weren't you?—A. In a minor way.

Q. It was the only other business you were in besides hardboard, is that right?—A. We were making quarterboard too.

Q. Quarterboard is a kind of a hardboard, isn't it?—A. No, it is a softer board. It is not under the patent.

Q. You are positive now in your recollection when you said "the entire industry," you did not include insulation board as well as hardboard?—A. I am not positive but my best recollection is we were talking about hardboard.

Q. You are not prepared to say now that you were talking about insulation board, too?—A. No.

Q. In your cross examination by Mr. Tuttle, you testified that in 1933 one reason that Masonite wished to make an arrangement with Insulite and the other companies was to get a uniform board on the market, a board of uniform quality, do you remember that testimony?—A. Yes.

513 Q. At that time did you ever consider whether you could achieve that purpose by selling your own hardboard to the corporations which ultimately became del credere agents?—A. We never considered the question of selling to them, as far as I know, after the patent was once validated.

Mr. Cox. All right, that is all I wanted.

ROBERT G. WALLACE, Sr., called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Cox:

Q. Mr. Wallace, you are now employed by the Masonite Corporation, are you not?—A. Yes.

Q. How long have you been in the employ of the corporation?—A. Since March 1, 1926.

Q. Will you tell me what position you first held when you first went with the company?—A. Sales manager.

Q. How long were you sales manager?—A. Until October 1935.

Q. And what position have you occupied since October 1935?—A. Vice president.

Q. You are vice president now?—A. Yes, sir.

Q. What were your duties as sales manager between 1926 and 1935, Mr. Wallace?—A. In charge of sales, advertising, traffic, credits.

Q. Will you be a little more detailed in respect to your duties as to sales, particularly just what did you do in connection with sales?—A. I hired the salesmen, trained them, prepared them for the road and supervised them in their travels.

514 Q. What have been your duties as vice president since 1935?—A. Administrative assistant to Mr. Alexander, the president.

Q. What are your duties as executive assistant to Mr. Alexander?—A. More or less general supervision of the general affairs of the company.

Q. Of all the affairs of the company?—A. Yes.

Q. Do you have any part in forming the policy of the company at all?—A. Yes, sir.

Q. Are you a member of the executive committee?—A. I am.

Q. Are you a member of the board of directors?—A. I am.

Q. Would I be correct if I assumed that when Mr. Gillies left you took his place in the organization of the company?—A. To some extent, although Mr. Alexander became more active at that time.

Q. But you took over a large part of the duties that had been previously performed by Mr. Gillies?—A. That is right.

Q. Now, Mr. Wallace, I want to call your attention to the paragraphs in the stipulation of facts, to wit, Paragraphs 41 and 42, which refer to the making of certain contracts between Masonite and the companies listed in those paragraphs in 1936. You remember that transaction, I assume?—A. Yes, sir.

Mr. LAMB. May I have the question read?

(Question and answer read.)

Q. Do you recall whether, prior to the execution of those contracts, you discussed the proposal that they be executed with any of the other officers of Masonite?—A. Yes.

Q. When did the first of those discussions take place? Do you remember?—A. After an audit in 1935, I believe.

Q. And with whom did you have those discussions?—A. Naturally with Mr. Alexander and counsel.

515 Q. And did you, before the agreements were executed, yourself have any conversations with representatives of any of the companies listed in Paragraph 41 with respect to the execution of the agreement?—A. Not until after the audit.

Q. And that was the audit in 1935?—A. That is right.

Q. What about the period of time between 1935 and October 29, 1936. Did you have any discussion?—A. The audit was completed, and then the new del credere agreement was discussed with the various agents.

Q. You discussed it with representatives of each of the companies that are listed in Paragraph 41?—A. I think so; yes; as I remember it.

Mr. Cox. Those agreements the stipulation says were made on October 29, 1936. May I ask Mr. Tuttle and Mr. Quarles—I haven't looked at the agreements, I don't think I have ever seen a complete set of them—but do they indicate the date of actual execution? It is my recollection that they do not, but before I ask the next question I wish to make sure.

Mr. QUARLES. I think you are correct in that, they do not show the date of actual execution. They are all dated as of the same date.

Mr. TUTTLE. October 29, 1936.

Q. Now, Mr. Wallace, do you know whether in fact the contracts were all physically signed on the same day, or were they signed on separate days?—A. I don't recollect, but my recollection is that they were all signed on that same day.

Q. They were all signed on the same day. Was the form of that agreement printed before it was executed?—A. I believe it was.

516 Q. Do you know whether, prior to October 29, 1936, the printed form of the agreement was submitted to each of the companies listed in Paragraph 41 of the stipulation of facts?—A. I think it was.

Q. Mr. Wallace, can you tell us now in sequence in your own words what the steps were between the conclusion of the audit in 1935 and the final execution of these agreements on the date, whatever the date was, when they were physically signed?—A. You mean the sequence of events?

Q. Yes; the sequence of events.—A. Well, in the first place there were numerous complaints about pooling by the agents, which has been testified to here in court this morning. That was a subterfuge to get a lower price to one dealer or another dealer. We felt that we had this contract to police or else with a favored nation's clause in it our company would be subject to arbitration, and we made every attempt to police that feature of it and all other features of the contract. The audit made by the auditors, the public accountants, showed other minor infractions of the contract, and then there were misinterpretations of the original del credere agency contracts becoming more evident every day that the contracts had to be spelled out in greater detail for the

benefit of all in order to properly handle the situation as principal and agent.

Q. That statement tells us the reasons, I assume, which led to the——A. Yes.

Q. Now what actual steps were taken in sequence? Do you remember that?—A. My memory—I believe that with counsel we drew up what we thought was the proper agency agreement spelling out the things that were not clear in the original agency agreement, and then discussed that agency, the new draft, with the agents.

Q. A moment ago you spoke of having received complaints about pooling. Were you referring there to the
517 practice of selling a car lot of products, or consigning a car lot of products to one dealer on the basis of the car lot price, when in fact the carload was to be distributed among a number of dealers?—A. That is right, because that put all the other agents, and ourselves, right out of any competition for those accounts. They were selling at a price lower than the bracket price.

Q. Have you any complaints other than about the agreements?—A. Of various natures; I don't recollect any of them now.

Q. Do you recollect any about mixed car lots of products?—A. I don't get the mixed car lots. There are two types of pools. One is a subterfuge to get a price. The other is pooled car shipments, in which the railroads permitted us through tariffs to incorporate in a carload shipments for six or eight dealers, each being separately blocked and separately marked. That is a pooled car, and a pooled car price. That might be mixed or "Presdwood" straight, or any of the hardboard products.

Q. Had you received any complaints about prices which the agents were charging for car lot shipments which included both hardboard and insulation board?—A. Only as pertaining to hardboard.

Q. Will you explain that answer, Mr. Wallace?—A. The only time that this pooling question comes up where hardboards were in the proposition in the carload prices is in less than carload quantities. Our own salesmen complained of that because it made them non-competitive with the agents on their own product.

Q. Well had you received any complaints about sales of insulation board being made at low prices in combination with sales of hardboard?—A. No.

Q. You received no complaints about that?—A. No. That is my present recollection

518 Q. You are quite positive of that?—A. That is just my recollection.

Q. The Masonite Company continued to operate, did it not, as the stipulation shows, I think, under the agreements which you made in 1936 until some date this year; is that correct?—A. That is right.

Q. Then the stipulation sets forth that as of March 20th certain new agreements were made? You recall that?—A. Yes, sir.

Q. The stipulation also says that they were executed physically on April 1st, but made as of March 20th? You recall that?—A. Yes.

Q. Now, Mr. Wallace, can you tell me when you actually in fact began to operate under these new agreements?—A. April 1st.

Q. Did you have any conversations with representatives of any of the companies listed in Paragraph 41 of the stipulation prior to the execution of these contracts of March 20, 1941?—A. I did, with counsel, and they being present with counsel.

Q. Without telling us anything about counsel can you tell us who the representatives of the other companies were with whom you conferred, apart from counsel? I don't want the names of counsel.—A. Oh, yes. Mr. Dahlberg of the Celotex Company. Mr. Ames of Johns-Manville Company. And Mr. Morrell of Insulite. I believe those are the only ones who were there.

Q. Did you have more than one conversation with those gentlemen?—A. Yes, there were several.

Q. Where were they? Where did they take place?—A. In New York, at the attorneys' offices.

Q. When were they, approximately? Can you remember?—A. January and February.

Q. Was a printed copy of the agreement which was
519 executed on April 1, 1941, discussed at these meetings?—A. I believe it was.

Q. Were all of the gentlemen you have named present at all of the meetings?—A. No.

Q. Some of them were present at some and others at others?—A. Yes.

Q. Was Mr. Dahlberg present at all of them?—A. I don't believe so.

Q. Was anyone besides yourself present at all of them?—A. I don't believe so.

Q. Were all these meetings held separately with each of these gentlemen?—A. They were meetings with one or more present and their counsel.

Q. You mean two or more present in each case?—A. Yes.

Mr. Cox. I am about to start a new line.

The Court. How long will that line take?

Mr. Cox. I think I should get through with this witness fairly early in the afternoon.

(Recess to 2:15 p. m.)

AFTERNOON SESSION

ROBERT G. WALLACE, Sr., resumed the stand.

Direct examination by Mr. Cox (continued):

Q. Mr. Wallace, I neglected to ask you before lunch whether you recall the execution of the agreements in 1937 with Flintkote and Dant & Russell, Inc., which are referred to in the stipulation. Do you recall that?—A. I do.

520 Q. Did you talk to representatives of those companies before those agreements were executed?—A. I don't believe so.

Q. You think you did not?—A. No, sir; I think Mr. Alexander did.

Q. Mr. Wallace, were you here when Mr. Tuttle made his opening statement—A. I was.

Q. And you heard that statement at that time. I want to read a part of that statement to you, and I wish you would listen to it. This occurs on page 30, Mr. Tuttle, of the folio 43, I think, of the typewritten copy. Mr. Tuttle in this passage, I think it is correct to say, is describing the agreements which were made in 1933, the del credere agents' agreements. And now I read: "It was not exclusive. We could have entered into such relations with anybody. We could do the same things ourselves." And I particularly call your attention to this sentence: "It was simply a provision that we would be fair to them, in other words, we would sell at the same price as our agents sold, and they would be fair to us by selling at the same price that we sold it." You understand what that statement means. Now I will ask you, Mr. Wallace, whether, between 1933 and 1936, that statement is an accurate statement of the policy of the Masonite Company with respect to the price at which it would sell?—A. That is right.

Q. And between 1936 and 1941, would it be an accurate statement of the policy of the Masonite Company?—A. It would.

521 Q. The new agreements became effective, you testified, on April 1st, in the sense that you began to operate under them on that date. Now, is that an accurate statement of what your policy had been since the 1st of April to the present day?—A. It is.

Q. So far as you know now, and I am asking just for your knowledge, does the Masonite Company have any intention of changing that policy?—A. I don't believe so.

Q. Mr. Wallace, prior to the execution of the 1936 agreements, when you discussed the agreements with representatives of the del credere agents, do you recall whether you ever told them that that was the policy of the Masonite Corporation?—A. The policy to do what; sell at the same price as the agents?

Q. Yes.—A. I imagine it was told them.

Q. Do you think you told them?—A. I don't know that I did, definitely.

Q. Well, does your answer mean that you have no present recollection now whether that was said or not?—A. My recollection would be that it was said.

Q. It was said?—A. Yes, sir.

Q. Now, recalling the conversations you had with representatives of the other del credere agents, prior to the execution of the agreements, which are dated March 20, 1941, do you recall whether you stated to them that it was the policy of Masonite to sell at the same prices as the agents sold?—A. I believe I made that statement to some of them.

Q. Do you remember who you made that statement to?—A. Not definitely.

Q. Did you make it to more than one?—A. It might have been Mr. Dahlberg, it might have been Johns-Manville, Mr. Ames, or any one of them.

522 Q. Did you make it, do you think, to more than one of them?—A. I may have made it to one or two; I don't know whether any more than that.

Q. What does the term "combined bids" mean in connection with the sale of hardboard?—A. A combined bid, to me, would mean where a lump sum bid on an entire carload or a proportionate part of a car was made in a lump sum on all products in that shipment.

Q. And you mean by that hardboard and some other products?—A. Whatever it might be mixed with it, if hardboard was in the proposition; yes, sir.

Q. Are you in a position to give me any estimate as to how much of the hardboard which Masonite sold between the 1st day of January, 1936 and the present time has been sold on the basis of combined bids?—A. I don't think there has been any on combined bids.

Q. Well, has any of it been sold in mixed carloads?—A. Lots of it.

Q. How much of it, would you say?—A. Oh, I would say 75 per cent.

Q. You testified before lunch that there had been complaints received prior to the execution of the 1936 agreements with respect to the operations of the del credere agents, or some of them,

under the earlier agreements. Do you recall that testimony?—A. Yes, sir.

Q. I now ask you specifically whether you can recall whether any of those complaints had to do with combined bids?—A. Maybe in one instance.

Q. No more than in one?—A. Yes, sir.

Q. You are quite clear that it was only in one instance?—A. One or two at the most.

Q. What were the instances, if you can recall?—A. I can't recollect them.

523 Q. Well, can you recall the particular products, or in connection with combined bids?—A. Well, it was a lump sum proposal on an entire carload. They did not set aside a separate price per thousand on the hardboard included in the car, which we insisted be set aside only on the hardboard part of the car. The rest of it we didn't care.

Q. I want to be sure I understand that. You mean that it was sold without a definite price being fixed for the hardboard part of the shipment; is that right?—A. On a per thousand foot basis; yes, sir.

Q. On a thousand foot basis. As so far as you can now recollect, there were only one or two instances where complaints were made?—A. I think so, to the best of my belief.

Q. Was it to correct that situation, among other things, that you determined to execute the 1936 agreement?—A. It was.

Q. Did you have audits made of the books of the del credere agents?—A. I did.

Q. That was throughout the period from 1933 on?—A. Up until the fall of 1935.

Q. Up until the fall of 1935?—A. Yes, sir.

Q. Now, after 1935 were any audits made of the books of the del credere agents?—A. I don't believe so; none to my knowledge.

Q. None to your knowledge. Were those audits made by your auditors or by independent auditors?—A. Independent auditors.

Q. Did you give those auditors any instructions as to what kind of an audit they were to make of the books of the del credere agents?—A. I cannot remember all the instructions, but I know that they were given a copy of the del credere's factors agreement and instructed to audit the stock of the hardboard, as to whether there was full compliance with the del credere agency agreements.

524 Q. Do you recall whether you ever instructed the auditors to examine the books of the del credere agents to determine at what price they were selling insulation board in combined lots with hardboard?—A. No, sir.

Q. Have you since the 1st of April, Mr. Wallace, caused any audit to be made of the books of the del credere agents under the 1941 agreement?—A. No, sir.

Q. I call your attention to paragraph 14 of that agreement. Do you recall that paragraph?—A. Yes.

Q. This paragraph provides that the books and records of the agent shall be open to inspection and examination of Masonite?—A. That is right.

Q. Have you taken any steps looking toward an examination of any of these books?—A. Certainly not within the last three weeks.

Q. Not since the 1st of April. Have you informed any of the agents as to what the nature of that examination will be, if any takes place?—A. No, sir.

Q. Do you know of your own knowledge whether any other officer or employee of Masonite Corporation has given such information to any agent?—A. I don't believe so.

Q. You don't believe so. Are you prepared to say that they have not?—A. Definitely.

Q. Who is Mr. Saberson?—A. Mr. Saberson is in charge of sales merchandise.

Q. What are his duties?—A. He has now my old position, in direct charge of sales and advertising.

Q. Would he have any duties in connection with the examination of these books?—A. No; he should not have.

Mr. TUTTLE. Mr. Cox, you don't claim that this provision for examination into the agreement refers to any books excepting as to hardboard?

Mr. Cox. Mr. Tuttle, the provision on its face is not ex-
525 plicit on that point, but I have one document which I am now submitting to you, which leads me to believe that perhaps it may. Will you mark this for identification?

(Marked "Government's Exhibit 17" for identification.)

Q. Mr. Wallace, I am going to hand you now Government's Exhibit 17 for identification, which is the original of the letter which purports to be written by Mr. Saberson to Mr. Glenn W. Cheney, Portland Building, Portland, Oregon, dated December 4, 1940, and I ask you whether you ever saw that letter before?—A. I have not seen this letter; no, sir.

Q. You have not seen that letter before?—A. No, sir.

Q. Mr. Wallace, you have read, I take it, many times the del credere agreements which were made in 1936?—A. Yes.

Q. I want you to look for a moment at the paragraph which appears on page 23 of the copy which I have, which is sub-paragraph (f) of Section 14 of that agreement, noting the underlining

which has been added by us (handing). You have read that?—A. Yes.

Q. Do you now recall that provision in the contract, Mr. Wallace, and I call your attention to the clause toward the end of the paragraph which begins "It being the intent hereof," do you find that?—A. Yes, sir.

Q. "being the intent hereof that such price, bid or quotation may be at the regular established prices of each such product applicable to the aggregate quantity of such product and to the class of product to which such price, bid or quotation"—do you see that?—A. Yes, sir; I do.

Q. I now ask you what you understand the words "regular established prices" to mean?—A. Whatever price the selling agent might place on his own insulation board to be mixed in carload lots with our hardboard.

Q. After the 1936 agreements were instituted, did you ever take any steps to discover whether the del credere agents
526 were adhering to this particular provision of the agreement?—A. I saw the reports of the salesmen.

Q. Do you recall now whether you received any reports from salesmen of any of the del credere agents who were not adhering to the regular established prices of insulation board?—A. There was no regular price for insulation board, so there was no way of checking the salesmen, or checking the insulation prices.

Q. Did you check on prices for which the combined lot was sold—the total price?—A. No; usually orders were not taken on that basis. They are taken on thousand lot basis.

Q. Now, Mr. Wallace, I want to ask you some questions about the operation and handling of hardboard under this earlier agreement. Were you familiar with the way it was delivered and the way it was handled and the way payments were made under the 1933 agreement?—A. No; I was not. I knew the way it was handled for shipping.

Q. Do you know about that?—A. Yes.

Q. Can you tell me whether, when the hardboard was delivered to the del credere agents from 1933 on, it was marked in any way with Masonite's name?—A. I would have no reason to check that.

Q. You don't know whether it was or not?—A. I was in charge of the company's sales individually at that time.

Q. You don't know about that. For the period from 1936 on, do you have any knowledge as to that fact for that period?—A. I believe it was marked with our patent license numbers in most cases.

Q. Was it also marked with the name, "Masonite"?—A. No.

Q. It was not. Was the name "Masonite" stamped or did it ap-

pear on the product in any way between 1936 and April 1st, 1941?—A. On our own shipments, naturally.

Q. On your own shipments, but I am asking shipments to the del credere agents?—A. I think not.

527 Q. That is your best recollection at the present time?—A. Yes.

Q. Now do you recall whether you ever granted permission to any of the del credere agents to use your trade-mark?—A. I know we did not.

Q. You did not. I call your attention to the fact that the stipulation sets forth on page 69 a list of trade-marks and brand names under which the del credere agents sold hardboard. Have you seen that?—A. Yes.

Q. You have seen that?—A. Yes.

Q. Can you tell me, Mr. Wallace, whether those brand names or trade-marks were placed on the hardboard by the del credere agent, or were they stamped on the board by Masonite?—A. I don't believe very many of them were stamped on the board I think they were mostly on the labels.

Q. And who put the labels on the hardboard?—A. In some cases Masonite, and in some cases the agent.

Q. Do you recall, looking at that list of companies, which companies fell into which classification?—A. You couldn't tell. They probably all put some of their labels on on consignment to their warehouses.

Q. It varied, according to where the shipment was being made?—A. I would think so.

Mr. LAMB. From what period is this, Mr. Cox?

Mr. COX. This is from 1936 on.

Mr. LAMB. On until when?

Mr. COX. Until the 1st of April 1941.

Q. Do you know for the period between 1933 and 1936 of your own knowledge whether Masonite ever asked the agents to affix notices to the hardboard which was delivered to them on consignment, showing that it was the property of Masonite?—A. I would have no reason to know.

Q. You would have no knowledge as to that?—A. No.

528 Q. Do you have any knowledge as to that from the period 1936 until the 1st of April 1941?—A. No. That would be handled by the bookkeeping department, or somebody else as a detail.

Q. Do you know who in your organization would know about that? Can you give us the name of anyone who would know?—A. I just can't tell you.

Q. All right. Do you know of your own knowledge, during

the period 1933 to 1936, of the way in which the del credere agents stored the hardboard they received from Masonite?—A. No.

Q. You know nothing about that. Do you know anything about that from the period 1936 to the 1st of April 1941?—A. I don't know if I get your question.

Q. I will put it in more precise form. So far as you know did Masonite ever ask any of the del credere agents at any time from 1933 until the 1st of April 1941, to post notices in their warehouses or storerooms stating that the hardboard on consignment was the property of Masonite?—A. I don't believe that was done. I may be wrong.

Q. It is your present belief that it was not done?—A. Yes.

Q. Do you know whether throughout this period from 1933 to the 1st of April 1941, Masonite ever asked the del credere agents to keep the hardboard on consignment separate from their other inventory? Physically separate?—A. What inventory do you mean? Their insulation board?

Q. Yes; take their insulation board, for example.—A. I don't know. It would be my theory that the hardboard being on consignment, as far as our warehouses were concerned, it would not be mixed with insulation board.

Q. Do you know whether or not it was mixed?—A. I don't know.

Q. Do you know whether Masonite ever asked any of the agents not to mix it?—A. I do not know.

529 Q. You don't know about that. Did you at any time between 1933 and the 1st of April 1941, take any steps to ascertain what kind of entries the del credere agents made on their books with respect to the hardboard they received on consignment?—A. I did not.

Q. Were your auditors asked to do that when they made examinations, before 1935, of the del credere——A. If they were it did not come to my attention.

Q. I see; you know nothing about it, then. Now I assume, from one of your previous answers, that you are not familiar with the way the payments were handled from the del credere agents prior to 1936; is that correct?—A. Yes.

Q. But you are familiar with the period of time from 1936 on?—A. Yes.

Q. Do you know whether, from 1936 to the 1st of April, 1941, Masonite submitted bills or statements to the del credere agents from time to time?—A. I believe they did after the agents had reported actual sales and only on actual sales.

Q. Will you just in your own words amplify that just a little bit, Mr. Wallace, and tell us how those statements were pre-

pared?—A. I don't know about that. I only know the general plan of it.

Q. But you know that statements were prepared and they were sent after the sales were made?—A. After the agents reported sales.

Q. Do you know who in the Masonite organization would be familiar with that?—A. I imagine Mr. Anderson, our auditor.

Q. Do you know whether there was any change in the method of payment in 1936, and I am not talking about the provisions of the contract; I am talking about what was actually done. Was there any change in the method of payment in 1936?—A. You mean under the new 1936 contract?

Q. Yes.—A. Well, if my memory serves me correctly
530 there was a partial payment made in the original contracts. In the 1936 contracts there was no payment.

Q. By "the original contracts" you mean the contracts made between 1933 and 1935?—A. Yes.

Q. Do you recall anything about that practice, other than that it was a partial payment?—A. That is all.

Q. You know there was a change in the method of payment?—A. I don't know the details.

Q. Do you know whether any of the del credere agents processed hardboard which they received from you in any way?—A. I don't believe they did.

Q. Do you know now whether Masonite has issued any instructions to the del credere agents under the agreement which was executed as of March 20, 1941, with respect to the method of payments under that contract?—A. I wouldn't know. That has not come to my attention.

Q. It has not come to your attention. Are you familiar with the facts as to the wrapping of hardboard between 1933 and the 1st of April 1941?—A. Yes.

Q. Can you tell me whether any hardboard was delivered to the del credere agents throughout that period of time unwrapped?—A. To their own warehouses I presume there were deliveries made unwrapped.

Q. And when it was not delivered to their own warehouses was it wrapped by Masonite?—A. Wrapped by Masonite.

Q. Do you have any knowledge as to whether the del credere agents in the case of hardboard which was delivered to their own warehouses, thereafter wrapped that hardboard before selling?—A. If the dealer wanted it wrapped I presume they would wrap it in these days.

Q. Do you have any knowledge now that they did do that in some cases?—A. They must, to meet competition.

Q. Now as to that hardboard which the agents wrapped after having received it unwrapped from Masonite, it is
531 true, is it not, as the price lists show, that there was a charge in the price list for that wrapping?—A. That is right.

Q. That is correct; isn't it?—A. That is correct.

Q. And was it the policy of the Masonite Company to require its agents to adhere to that charge for wrapping in the case of the hardboard the agents wrapped?—A. Yes, sir; and the Masonite Company did it themselves.

Q. Do you know where the agents got the paper that they wrapped the hardboard in?—A. No.

Q. They did not get it from the Masonite Company?—A. No.

Q. Does that practice and policy remain unchanged under the agreement which was executed the 20th of March 1941?—A. The charge is in the flat price.

Q. The charge is in the what?—A. In the flat price.

Q. Do you know what the practice was between 1933 and 1936 as to the payment of freight on hardboard shipped to the del credere agents? Do you know who paid the freight, in fact?—A. The del credere agent, I imagine, taking it out of the commission covering it.

Q. Was that true from 1936 to the 1st of April 1941?—A. Yes, sir.

Q. Do you know who, in fact, paid for the insurance on the hardboard which was delivered by Masonite to its del credere agents between 1933 and April 1, 1941?—A. No.

Q. You know nothing about that?—A. No.

Q. You don't know whether Masonite paid for that insurance?—A. No. It did not fall in my jurisdiction, so I would not know it.

Q. Do you know anything about what the practice in that respect has been since the 1st of April 1941?—A. Since the 1st of April?

Q. Yes.—A. Our new contract definitely stipulates that Masonite pays it.

532 Q. Has it, in fact, paid any amount for insurance since the 1st of April?—A. No, sir.

Q. Has it paid any premiums for insurance?—A. I don't know whether they have been rendered any invoices or not.

Q. Do you know for the period of time between 1933 and 1941 whether Masonite paid any taxes on the hardboard which it had shipped on consignment to its del credere agents?—A. I know part of that time that they did not. Prior to that I suppose the same practice.

Q. What time are you speaking of?—A. 1936 to 1941.

Q. 1936 to 1941 on——

Mr. TUTTLE. Have you any particular taxes in mind?

Mr. Cox. Well, any tax.

Q. Do you know whether or not Masonite paid any tax?—A. I don't know that.

Q. But it is your present recollection that between 1936 and 1941 some taxes at least were paid for by the del credere agents?—A. And whose commission was as great enough to take care of it.

Q. And you think that was the practice between 1933 and 1936?—A. Yes.

Q. Now I call your attention again, Mr. Wallace, to this del credere agreement made in 1936, and particularly to the provisions in Section 9 with respect to "longs" and "shorts." Do you recall those provisions [handing]?

Mr. Cox. I think perhaps we can save some time in this connection by that stipulation, so I am going to abandon that line of questioning for the moment, reserving the right, of course, to recall the witness if we can't reach an agreement.

533 With the consent of counsel for the defendants, I am now going to offer in evidence the photostatic copy of a document which is headed "Masonite Corporation, 111 West Washington Street, Chicago, Illinois," dated November 9, 1937, and addressed to all del credere factors, signed, I believe, by Mr. Alexander, the president of the corporation.

(Marked "Government's Exhibit 18.")

Q. Now calling your attention again to Section 9, Mr. Wallace, do you know whether, at any time between 1933 and April 1, 1941, it was the practice of any of the del credere agents to cut standard size boards into two or more pieces?—A. I don't think it was the general practice. It might have been done at times.

Q. Well, do you know whether or not it was done at times?—A. I do not.

Q. You have no knowledge of that at all, not even for the period between 1936 and the April 1st agreement?—A. We presumably did the cutting.

By the COURT:

Q. Did these different agents carry stocks of your hardboard at all times?—A. Yes; we consigned it to various warehouses of factors.

Q. And then did they fill their respective orders directly from their plant?—A. Partially, and then in direct shipments from our factory direct to their customers.

Q. How much stock would any one of them carry at any particular time; large stocks?—A. Well, it depended entirely, your Honor, on the volume of business the particular agent was doing, in a general way. Some of the larger agents probably car-

534 ried—oh, I can only make a rough estimate; six, seven, or eight million feet of board at various points; maybe being totaled it might be some more or less.

Q. Wouldn't that be rather an expensive luxury to pay the freight from your plant to agent and then pay an additional freight from the agent all the way back to the customer or dealer?—A. No; we stood it in some cases, we stood part of the freight, that additional freight.

By Mr. Cox:

Q. You absorbed that, did you say, in practice?—A. Part of it.

Q. Did you require the del credere agents to carry a variety of the types of hardboard? Do you understand the question?—A. Yes.

Q. Was each del credere agent free to order the kind of stock he wished from you?—A. On consignment?

Q. Yes.—A. Yes.

Q. Do you know whether any of the del credere agents, in their advertising or in any other way, disclosed to the purchaser that they were acting as an agent for Masonite?—A. I don't know.

Q. You don't know anything about that?—A. I never checked their advertising for that feature.

By the COURT:

Q. Well, were these boards in different shapes and sizes? You have spoked about the 12-foot size and the 8-foot size.—A. Well, those 4 x 8, 4 x 9, 4 x 10, all being cuts from the 4 x 12.

Q. How about the width; were they all the same width?—A. The widths were all 4 feet.

Q. Then they were not made up in different shapes other than——A. In flat boards.

535 Q. So that it was not a very extensive line?—A. No.

By Mr. Cox:

Q. Well, the boards did differ somewhat in quality in their characteristics?—A. In thickness.

Q. In thickness?—A. Yes.

Q. And they differed somewhat in weight, did they not?—A. Well, naturally the difference in thickness would make a difference in weight.

Q. And were some kinds of hardboard better adapted to particular uses than other kinds of hardboard?—A. That is correct.

By the COURT:

Q. How did you protect your patents, by marking on the board deliver to what you call a del credere agent, to wit, the defendants in the case—do you know how you protected your patents?—A.

I believe that was done, your Honor, through the advice of patent counsel, by putting the patent marks on it.

Q. That is, you stamped the marks on each board?—A. I think so.

By Mr. Cox:

Q. And you think Masonite's name was not stamped on the board in connection with the patent mark, is that right?—A. I do.

Q. The board itself had the patent mark on?—A. Yes.

The COURT. I think that is enough, to protect their patent rights.

Mr. COX. I think there is no doubt about that, your Honor.

536 Q. Mr. Wallace, do you recall whether you had any conversations in 1935 or 1936 with representatives of the Celotex Corporation about the export market?—A. Yes.

Q. Who did you talk to?—A. I talked to Mr. Dahlberg.

Q. Can you tell us how those conversations started? Did he come to you?—A. Yes, he very definitely came to us.

Mr. TUTTLE. I object to this. I don't think that is in the pleadings at all. I don't recall anything about it at least. If it is, I should like to be informed. I object to it as immaterial and irrelevant.

Mr. COX. I am offering a line of proof, or I want to attempt to go into it as designed to show that all of these arrangements were to prevent anyone else except Insulite from manufacturing hardboard for export.

Mr. TUTTLE. This complaint of Mr. Cox's is very detailed, but I do not recall that this is one of them. If I am mistaken about this, I would like to be informed.

Mr. COX. I think it has application in the way Masonite monopolizes the manufacture of hardboard, but not on the ground that it was in restraint of commerce.

Mr. TUTTLE. Like all things in this case, we stand on the patent and naturally in order to get export rights, they would have to deal with us. I cannot see how it is material or relevant or that it is within the pleadings.

Mr. COX. I don't see any purpose in arguing the merits with Mr. Tuttle at this time. I have indicated the theory on which it is offered.

The COURT. I don't know what the question is. Will you read the last two or three questions.

(Record read.)

537 The COURT. I will permit the question.

Q. What did Mr. Dahlberg say when he came to you?—A. He wanted the right to buy the hardboard from use to supply

his export market or that part of the market that was not supplied or could not be supplied by his English plant.

Q. He asked for the right to buy hardboard from you, is that right?—A. The right to sell it, yes.

Q. The hardboard which you made and delivered to him?—A. That is right.

Q. Did he ask you for a license under the patent to manufacture hardboard himself?—A. He did not.

Q. Did you make any arrangements with him at that time whereby he could?—A. That is right, we did.

Q. Did the Celotex Company thereafter buy hardboard from you for export to foreign countries?—A. They sold it for us for export.

Q. Did they sell it as your agents or did they buy it?—A. I don't know the terms of the contract—this is four or five years ago.

Mr. Cox. Is that part of the stipulation, do you recall?

Mr. HALERAN. I think not. We never gave a thought to that relationship.

Mr. Cox. I am through, your Honor.

Cross-examination by Mr. TUTTLE:

Q. Mr. Wallace, your connection with the company began in 1926?—A. Yes, sir.

Q. At that time what kinds of hardboard, according to their respective names, were being made by Masonite Cor-
538 poration?—A. Standard "Quartrboard" and 1/8th inch "Presdwood."

Q. What determined the difference between those two kinds of hardboard?—A. The difference in density—specific gravity.

Q. That is the result of a difference in pressure on the kind of material used?—A. Yes.

Q. Was there a difference in functional use for such several kinds of hardboard?—A. Yes.

Q. And gradually, as time passed, were there different kinds of hardboard added?—A. Different thicknesses and different qualities, a second board that came in use being 3/16ths untempered "Presdwood"; then we got 1/4-inch untempered "Presdwood," which was another thickness, specifically used for concrete forms; then we had gradually developed some sales through the retail lumber dealer; then we had to get, as I recall it, a board more impervious to water and moisture, so a tempering process was designed, 1/8th inch, 3/16ths, and 1/4-inch, were tempered, and both sold as tempered and untempered boards.

Q. You had special spellings of these different kinds of boards so as to give it a trade symbol, did you?—A. Yes, sir.

Q. And hardboard itself, for purposes of the trade, was simply run together as one word?—A. That is correct.

Q. And so used consistently by your company?—A. Yes.

By the COURT:

Q. What was "Presdwood"?—A. "Presdwood" is hardboard——

Q. Was that a trade name?—A. That is a trade name.

Q. What did that apply to particularly?—A. It applied to the "Presdwood," hard "Presdwood," 3/16ths, 1/4-inch, 1/8ths inch thicknesses.

539 Q. The board that you called "Presdwood" hardboard was known to the trade as "Presdwood," was it?—A. Yes, "Presdwood."

By Mr. TUTTLE:

Q. May I put it this way: the generic name for your product was hardboard, but you differentiated the varieties by putting another name in front, which was frequently used alone, without the generic name, is that correct?—A. Standard "Presdwood."

Q. How do you spell this name?—A. "P-r-e-s-d-w-o-o-d."

Q. All these different kinds of boards with the different names that you have alluded to were made in the same fundamental way by the disintegration of wood and the preservation of lignins in the way you have described?—A. Definitely.

Q. So they were all under the same patent?—A. Yes.

Q. Now, taking the period down to October 10, 1933, I would be glad if you would state what the situation was from the point of view—the practical situation was from the point of view of getting your products into the building industry; what kind of competition, if any, you met, and so forth, in an effort to sell in competition with products you found were already in the field at the time you were trying to introduce these hardboard products serving the same functional uses?—A. Well, as I remember, at the time we started the sales, there were approximately 15 to 20 boards, any one of which in certain particulars, could supplant the "Presdwood" that we were trying to sell, or the hardboard we were trying to sell, (and these boards were looked upon by the lumber dealer, the architect and contractor, that is, hardboards, as specialties, so it took an enormous amount of sales work and educational

540 work, and to advertise them to get their use started against other boards that had already been in use and had had public acceptance.

Q. Your boards, without going into it extensively, would serve what functional uses in the building industry?—A. Well, they could be used for panelling, for lining of concrete forms and for any general purpose of inner wall construction at that time and since that time for outerwalls, when it comes to tempered "Presd-

wood," so as to reduce absorption of water or moisture, for bathroom walls, for basement interiors, and a number of other purposes.

Q. At that time too, we have had some reference to the fact that some boards were used in connection with the industrial field, those that were undergrade, what was the nature of the fabricated products, and so forth, for which this sub-grade or sub-standard board was serviceable as boards?—A. The best illustration I can give you is one that I personally handled, that was the introduction of seconds or sub-standard "Presdwood" in the automobile field where the board surface did not need to be good, the density did not need to be even, its water resistance could be less than we would be required to use for building purposes, still it made a very satisfactory product with which to apply upholstery and to be used as inner lining on passenger automobiles, and was also used in truck bodies and cabs in the automobile industry. The board did not have to take paint, could have a rough surface or scratched surface or any one of a dozen different things that took it away from first quality standards. That is one illustration. There are a number of other places where salvage companies were able to salvage second quality board by cutting out all of the good parts in small pieces of the full size of 4 x 12 and still they were of good enough quality to use small pieces. For
541 instance, one use for that is in dry cell batteries. I believe we have some party in Ohio that still uses small pieces of boards, small circles, for that purpose. I have one customer in Nebraska that manufactures certain store counters for hardware stores and things of that sort, where they want small pieces on top of counters in the sale of screws and things of that nature.

Q. And it was the commercial field of that character to be filled with the use of the short boards and the use of sub-standard boards that the company reserved to itself?—A. That is right.

Q. Without going into it over again, were the purposes which actuated it doing so stated by Mr. Gillies?—A. That is right.

Q. Is there anything you wish to add to that?—A. Well, it is one of those ever-present burdens that is still with us. We still have an enormous amount of board every year to sell that is certainly not first quality and couldn't be sold as first quality. The percentage of seconds may be down to annual production, but on account of the increased volume it is still a large amount, running last year to about 25 to 30 million feet.

Q. Turning to the Grade A board, did I understand you to say that in 1933 some 15 other artificial boards could be used for some of the functions for which hardboard was used?—A. Yes.

Q. Were these defendants, and other defendants, and other concerns, also makers and distributors of such kinds of board?—A. They were.

Q. And those concerns all used other forms of binder, except in the instances where you had occasion subsequently to sue for infringement; is that right?—A. That is right.

Q. Do you know a board that is known as "Flexboard,"
542 an artificial board?—A. I don't know of its characteristics; I know the board, yes.

Q. Which company at that time put that out?—A. "Flexboard" is manufactured by Johns-Manville Corporation. It is one of their cement board or asbestos board products.

Q. That is made out of cement, isn't it?—A. Yes, sir.

Q. Do you know of any illustration that symbolizes the competition that is possible between "Flexboard," for example, and hardboard?—A. Very definitely.

Q. What is one that you have in mind?—A. The lobby in the restaurant at the Pinehurst Hotel at Laurel, Mississippi, where our factory is located.

Q. You mean that lobby has "Flexboard" right under the nose of your company making hardboard in the same community?—A. That is right.

Q. And your hardboard could serve the same purpose?—A. Very definitely, because it is interior panelling.

Mr. TUTTLE. I thought I had the samples here, but I am a poor traveling salesman. Until they get here I will go on to some other subject.

Q. Now, taking October 10, 1933, as the date when the first del credere agreement was signed, there was signed also, according to the stipulation, an agreement of similar character with National Gypsum on October 31, with Johns-Manville on November 30th, with Armstrong on December 1st, and with Hawaiian Cane on December 4th, all in 1933. Will you tell me, Mr. Wallace, whether at the time those agreements were signed there in 1933 the price of hardboard went up, or whether it went down?—A. Well, I definitely know that it did not go up, and I think there was a cut in price on hardboards some time in the midsummer of that year as near as I can recollect.

543 Q. May I put it this way; as a result, or as a consequence of signing these agreements the price of hardboards did not rise?—A. No, sir.

Mr. COX. I object to that. There is no foundation laid to enable this witness to testify as to a causal connection between the two.

Mr. TUTTLE. I didn't mean a causal connection. I am referring to an effect, that notwithstanding the fact that——

Mr. COX. Perhaps I misunderstood the question. May I have the question read?

(Question read.)

Mr. COX. I withdraw the objection.

The COURT. I will sustain the objection to that question.

Mr. COX. All right.

Q. Either at the time, or during the remainder of the year 1933, or during the year 1934 beginning with the period October 10, 1933, did the price of hardboard go up?—A. No.

The COURT. You mean the price at his plant. His price?

Mr. TUTTLE. His price; yes.

The WITNESS. No, it did not.

Q. The hardboard was being sold according to a dealer's list price put out by your company?—A. Yes, sir.

Q. And the prices mentioned in that dealer's list price did not go up?—A. No, sir.

544 Q. And you say sometime——A. There may have been one exception to that. I am just trying to recollect from memory. "Deluxe Quartrboard," there may have been some increase in that, but that was a small selling item of the line. Certainly there was no increase in price of the large selling items of hardboards.

Q. And what was the one that was a small selling item?—A. "Deluxe Quartrboard."

The COURT. There would not have been apt to have been any increase in price, regardless of this agreement in the fall of 1933 and 1934, because there was a declining market. It was very difficult to push much of anything at that time.

The WITNESS. Well, we were getting out of it a little bit.

The COURT. Your stocks were increasing. I think it has been stated here that at the height of the depression you were loaded up with merchandise that you were not able to get rid of. It may have been earlier than 1933.

Q. Are you familiar with the general course of the prices from 1933 down to date?—A. I didn't hear your question.

Q. Are you familiar with the general course of the prices of hardboard from 1933 down to date?—A. I couldn't name actual figures, but the trend certainly has been downward until last fall or late this winter.

The COURT. We might take a recess at this point.

(Short recess.)

545 Cross-examination by Mr. TUTTLE:

Q. Mr. Wallace, did the Masonite Corporation, so far as you know or ever heard, make any attempt to control or dictate the price at which the retailer or the wholesaler sold to the public?—A. No, sir.

Q. Reference has been made here to the matter of competition as between the Masonite Corporation on the one hand and its own

agents on the other. Was there such competition?—A. Definitely so.

Q. Now will you tell the Court in what it consisted?—A. Well, we never stopped soliciting the del credere agents' dealers or wholesalers any more than they stopped trying to solicit our wholesalers and dealers, and we are still continuing to try to get dealers that are selling insulation and hardboard products for the agents to stock and handle Masonite's own products.

Q. Do you know anything at all as to the cost to Masonite Corporation of making its own outlet for its products?—A. Well, it has naturally been millions of dollars throughout the years.

Q. Do you know anything about the relation of that cost to Masonite in connection with its own outlet in comparison with the amount of commissions which it pays to the agents?

Mr. Cox. May I have that question read?

(Question read by the reporter.)

The Court. I don't know what that means.

Mr. Cox. I don't, either.

Mr. Tuttle. Well, I will put it differently.

Q. You say you know that the expense of selling its products, where Masonite sells direct, runs, as you said, into
546 millions. On the other hand, where the agents sell direct in connection with orders which they secure from customers and place with the plant or sell from consignment, I am asking you whether or not you know, and if you don't you can say so, what the comparison is between the cost to the Masonite paying the commissions on the one side and the cost of doing the business direct when it does it direct?

Mr. Cox. I don't like to object, but can't we find out from the witness, if he knows, what the commissions amount to, and then the comparison will stand out perhaps better?

Mr. Tuttle. Well, the commissions are all in the agreements which are themselves part of the stipulation.

Mr. Cox. I mean the total amount of payments made in the form of commissions. That is what you want, isn't it?

Mr. Tuttle. No; what I am meaning is the proportionate cost for a given quantity, the unit cost.

The Court. Can you answer that question?

The Witness. Yes, sir.

The Court. All right.

A. I believe that the total cost to Masonite of all the services performed will be higher than the commission paid the agent.

Q. On a unit basis?—A. On a per thousand square foot basis.

The Court. Why do you say, then, that you are in competition with the agent, just as a matter of business judgment?

547 The WITNESS. Because the more volume we can secure for ourselves, presumably, natural laws taking place, the lower our sales cost will be.

By the COURT:

Q. What have you got to offer a dealer that an agent can't offer? You can't sell to the dealer at a price lower than the agent sells?—A. That is correct.

Q. Well, what can you offer as an inducement to get the dealer to come directly to you instead of coming to you through the agent?—A. One very definite thing, your Honor, is concentrated resale work on the part of our own salesmen promoting the sale of hardboard products for the dealer.

Q. That you can't figure in dollars and cents, can you?—A. You can as to the total.

Q. Well, I understand you to say the cost of selling direct by your own company to the trade would be higher than the cost of selling indirect through these del credere agents?—A. That is right; but still if we got more dollar volume coming in to our company for us to supply on our own sales, we naturally would expect a reduction in sales cost.

Q. Of course that is true, but that is assuming that the del credere agents are not capable to develop the trade direct in the districts where they are operating. If they are not doing it and you went in and do it better, then of course you increase the volume of your business?—A. That is right.

Q. But assuming they could do it about as well as you could do it, you would be better off to leave them alone?—A. Except that we tried to concentrate on the dealer and show him that we are concentrating on the proportion of resale work for him on hardboard.

The COURT. Then it is a matter of pride with you.

548 By Mr. TUTTLE:

Q. Is it because you are seeking to reduce the cost of the freight on the business which you do direct, that you are soliciting these dealers?—A. Yes.

Q. In order to increase or to spread the cost over a greater volume?—A. Yes.

Q. And that is one reason why you are in competition, as you said?—A. That is right.

Q. Did each of these agents have various warehouses throughout the country or did they only have one or two?—A. I don't know exactly where their warehouses were placed, but some agents had warehouses across the country; other plants were spread all over the country, too.

Q. The hardboard which they obtained on consignments would be placed at the various warehouses?—A. Where they had warehouses, and at factories where they had factory warehouses.

Q. And at times did they rent warehouse space so as to have distributional warehouses?—A. I think that was true.

Q. So that any stock placed at different warehouses under the control of one agent, the agent would be able to fill the demand of the customer from a warehouse not too distant?—A. That is correct.

Q. And that, of course, would have the effect on the total amount of freight which the transaction would ultimately represent?—A. Yes.

Q. And another question, the freight to the warehouse is on a carload basis, is it not?—A. Yes, sir.

Q. Which is the lowest unit of freight there is?—A. That is right.

Q. Whereas freight from the warehouse to the customer might, unless the order were large, be on a less than carload basis?—A. That is correct.

549 Q. You were asked about the auditing of the books in 1935, I think; did you at any time or as far as you know, did anyone connected with the Masonite Company ever issue any instructions to the auditors to look into the prices being charged or obtained by the agents on any of their products other than hardboard?—A. No, sir.

Q. It was solely a hardboard product?—A. That is right.

Q. And has that been the company's policy so far as policing or auditing is concerned?—A. As far as policing is concerned, there was no auditing.

Q. That was the only auditing?—A. That is right.

Q. Is there, as regards hardboard, to your knowledge from your observation, any competition between the agents themselves in securing orders?—A. Competition on hardboards?

Q. Yes.—A. Yes; it goes on all the time.

Q. What does that consist of?—A. Soliciting dealers and wholesalers and stocking orders.

Q. They solicit the same dealers and wholesalers?—A. Yes.

Q. A suggestion is made that I ask you what the advantage from the point of view of the customer is of having these warehouses located at the various points throughout the country, as the agents do?—A. Quick deliveries of small lots.

Q. Has the Masonite Company itself any warehouses?—A. Two, now.

Q. Where are they located?—A. One in Newark, New Jersey and the other one—there are three—Los Angeles, California, and San Francisco.

Q. When were each of those established, can you give us the approximate dates?—A. I cannot give you the dates. I would say the Newark warehouse has been in existence between three
550 and four years, and the Los Angeles warehouse the same length of time; the San Francisco warehouse about a year.

Q. Were those warehouses established by Masonite for the purpose of developing an outlet for itself as distinct from through the agents?—A. That is right; to give the same service as the agent was able to.

Q. As part of this competitive effort as against the agents?—A. Yes.

Q. Has here been one established in Chicago, in addition to the three you have mentioned?—A. That is correct; about two years ago.

Mr. TUTTLE. I think that is all.

By Mr. LAMB:

Q. Mr. Wallace, in answer to a question from Mr. Cox, as I recall it, whether after 1936 Masonite sold any hardboard to an agent for a fabricating process, I believe you answered yes. Do you recall that testimony?—A. I believe I answered "No."

Q. Or no. You answered "No." Now you recognize Masonite material, I take it, when it is used in a fabricating process?—A. That is right.

Q. I show you several samples, and ask you whether or not you recognize that Masonite hardboard is used in the making of the product, samples of which have been handed to you?—A. I do.

Q. Will you state whether or not it is not the fact that beginning in August of 1938 Masonite did sell to the Armstrong Cork Company, and continues to sell, quantities of hardboard for fabricating a material such as you now have in your hand, and which is called "Monowall"?—A. That is right. I confused it with Standard Wall Covering.

551 Q. So you want to correct your testimony?—A. Yes; I would like to. Standard Wall Covering Company has been taken over by Armstrong Cork Company, and I lost sight of it.

Q. And that change occurred about in August 1938?—A. I don't know the date, but I know that it has.

Q. In other words, Masonite was selling to a company called Standard Wall Covering Company, and then later on sold the same material to Armstrong Cork Company direct?—A. That is right.

Q. And do you recall that Armstrong Cork Company did buy the assets of the Standard Wall Covering Company in 1938?—A. That was my understanding.

Q. I take it that since that time the Masonite Corporation has continued to sell this hardboard material to the Armstrong Company?—A. That is correct.

Q. And as to those sales there are no understandings of any kind as to resale price, are there?—A. I don't even know the price.

Mr. LAMB. That is all.

By Mr. TUTTLE:

Q. There are just two questions, in view of some of the examination. Did the Masonite Company ever make any effort so far as you know in your experience to fix or control the price of insulation board?—A. I have already testified that we did not.

Q. And when you fixed the price of your own patented product, hardboard, did you fix it, or did your corporation fix it as a result of your own decision?—A. Free and independent of anything.

Q. Without consultation with the agents?—A. That is right.

552 Mr. COX. Have the defendants finished?

Mr. TUTTLE. Yes.

Redirect examination by Mr. Cox:

Q. Mr. Wallace, on your cross-examination by Mr. Tuttle you were asked about sub-grades of hardboard. Do you remember that?—A. Yes.

Q. I think this morning Mr. Gillies told us what percentage of sub-grade board of the total production of Masonite up to 1935 or 1936 was. Can you give us similar information for the period from 1936 to the present time?—A. Well, of course, there is every attempt made to reduce the amount of sub-grade board manufactured. It now runs from 1936 on down to the present time—I would say it would run somewhere from 30 per cent, maybe, down to 12½ per cent. It might be less and it might be a trifle more for the last year.

Q. For 1940 your judgment is that it would be about 14 per cent?—A. My judgment would be somewhere around 12½ per cent of the volume made that year.

Q. When you use the word "sub-grade" in that sentence do you mean both hardboard which is defective in its qualities, either its finish or some other way, and the short sizes, which are—— A. No; I do not. I only mean sub-grade board.

Q. You mean board that is sub-grade in the sense that it is inferior or defective in some way?—A. That is right.

Q. Now, do you sell any board at the present time for industrial uses, which is not sub-grade?—A. Oh, yes; lots of special boards we make now for industry made to special specifications and for special purposes.

Q. Take in the year 1940, are you in a position to give us an estimate as to how much or what part of your sales

553 for industrial uses consist of sub-grade board?—A. Pretty hard question, Mr. Cox, but I would say 50 per cent, offhand.

Mr. TUTTLE. We expect to give figures on that later. It is part of our understanding for a further stipulation.

Mr. COX. All right; I will let the answer stand, or withdraw it. Very well.

Q. Now, Mr. Wallace, you have testified that you are generally familiar with hardboard prices from 1933 on. Do you recall that testimony to Mr. Tuttle?—A. Yes, sir.

Q. And you testified that the prices did not go up in 1933. You remember that testimony?—A. That is right.

Q. Now the prices are all delivered prices, aren't they?—A. F. o. b. factory, with freight allowed.

Q. When you were speaking of prices going up, or not going up, did you mean the f. o. b. price or the price in a particular city?—A. It is the same thing.

Q. It is the same thing. It doesn't make any difference?—A. It doesn't make any difference.

Q. Now let us take a price. Do you know anything about the price of any hardboard products on a delivered basis in 1933 in New York or Philadelphia?—A. Well—now this is recollection—I would say that in the winter of 1932 and the spring of 1933 the price on 1/8th inch "Presdwood" was somewhere around $45 or $46. That is from memory.

Mr. TUTTLE. That is per thousand?

The WITNESS. Per thousand square feet.

Q. Is that on a carlot basis?—A. That is on a carload basis; yes, sir.

554 Q. To what day or what date did that price apply in 1933?—A. Up to some time this summer in 1933, I would say, if my memory serves me.

Q. Back in October of 1933 do you know whether the price of hardboard—take that variety you mentioned, 1/8th inch "Presdwood"—did that price go down?—A. It did not go down at that time. I think it went down prior to that time.

Q. It didn't go down after October 9, 1933?—A. I don't believe so. It went down before that considerably.

Q. Did it go down in 1934?—A. No, I don't believe it did go down.

Q. It didn't go down?—A. No, sir.

Q. Did it go down in 1935?—A. No, sir.

Q. Did it go down in 1936?—A. No, sir.

Q. Did it go up in 1935 at any time?—A. I believe that it did some time in the summer of 1935.

Q. And do you recall whether it went up again in 1935, after

that first rise in the summer?—A. I don't believe it did. I don't remember.

Q. Do you know how far it went up?—A. I think it went up on 1/8th inch basis somewhere from $1.50 to $2 a thousand.

Q. Do you remember whether the price went up in 1936?

Mr. TUTTLE. Mr. Cox, would you pardon the interruption? Haven't we all these figures in the stipulation?

Mr. COX. I went into them because you opened it up.

Mr. TUTTLE. I was only dealing with the trend, the generalization.

Q. If you can, please answer the question.—A. I cannot; I am sorry.

555 Q. Now, you testified on cross examination, Mr. Wallace, that in 1933 there were about 15 boards that could be used as substitutes for hardboard?—A. Fifteen or more.

Q. Fifteen or more?—A. Yes, sir.

Q. Were there many more than 15?—A. You are asking me to go back a long ways. I would say that there were probably 20 or more.

Q. Were those boards substitutes for all of the uses for which hardboard could be used?—A. Some of them at that time, on the untempered boards, would probably be considered full substitutes.

Q. And they could be used as full substitutes?—A. As against our present tempered boards, I don't think they could.

Q. But as against the boards you were making then?—A. I think they probably could, because they were——

Q. Do you recall how many or what companies were making those particular boards at that time?—A. Well, there was Upsom and there was Compoboard at St. Paul, there was Certain-Teed, there was Celotex, Johns-Manville; all the present agents certainly were making boards in those days except those that were not manufacturers. There were some agents that were not manufacturers of any boards in those days. Certain-Teed had a good bit of this business, but not a manufacturer of insulation board.

Q. Were they making these boards that were substitutes for all of the uses of hardboard?—A. I don't know how you place the word "substitute." I would say that they could be used for the same purposes that the untempered Presdwood could be used for.

Q. Could they be used for the same purpose that pressed wood was used for?—A. Yes; eighth-inch pressed board at that time.

556 Q. Could they be used for all of the same purposes that 1/4th inch Deluxe "Quartrboard" could be used for?—A. Yes.

Q. Was that true also of ¼th inch ordinary "Quatrboard"?—A. What do you mean? Your first statement I took to be standard "Quartrboard"; then you are now designating it as ordinary "Quartrboard." To me they are one and the same.

Q. Is there no difference between ¼th inch ordinary "Quartrboard" and ¼th inch deluxe?—A. Oh, yes; considerable difference; difference in density, difference in surface, differences in strength, specific gravity, and a lot of things.

Q. Well, let's start in again. Could these boards that we are talking about, in 1933, have been used as complete substitutes for what you and I have been calling ordinary ¼th inch "Quartrboard"?—A. Very definitely.

Q. Could they be used as a substitute for what we have been calling the ¼th inch deluxe "Quartrboard"?—A. The deluxe "Quartrboard" did not come into being probably until some time in late 1933 or 1934. Now, I am not sure, but the deluxe serves special purposes, and it could in certain instances be used as a wall covering, of course.

Q. Is it your recollection now that that could be used for all the purposes of the deluxe "Quartrboard"?—A. No.

Q. Now, you did testify on cross-examination, Mr. Wallace, that you are competing all the time with your del credere agents or customers; is that right?—A. That is correct.

Q. And you also testified, in response to questions from Mr. Tuttle, that that competition was not carried on in the price sense; is that correct?—A. That is correct.

Q. But that you carried it on by trying or having your salesmen go out to solicit orders which would be filled by wholesalers and dealers; is that correct?—A. Yes.

557 Q. Now, do you know whether the del credere agents also have salesmen who go around and solicit orders which are filled by their wholesalers and dealers?—A. Very definitely.

Q. They do?—A. Yes, sir.

Q. In fact, you made this arrangement because they did have a sales organization of that kind?—A. Absolutely.

Q. So far as you are concerned, you want them to do that kind of soliciting?—A. Very definitely.

Q. You adopted, as I understood your testimony, the statement by Mr. Gillies this morning, that the reason your company adopted this arrangement for selling hardboard was because you were interested in getting as wide a distribution as possible?—A. And more volume.

Q. And more volume?—A. Yes.

Q. Was that the reason your company adopted an agency arrangement rather than a sales arrangement?—A. I believe so; plus the patent.

Q. Well, did price have anything to do with it, in your making the choice between sales arrangement and the agency arrangement?—A. Well, it was quite definitely a decided step for a company the age of our company to take at that time, and speaking only for myself in charge of the sales department at that time, I was quite fearful of the psychology of a lot of agents selling the same product; there is no question about it.

Q. Well, I am not sure I understand your last remark. Exactly of what were you fearful?—A. Here were all established companies. My job at that time was to promote the sale of Masonite products exclusively for Masonite, and so really I looked on it on that basis.

Mr. Cox. Now, I am going to ask the reporter to read the
558 question before the last one to you, and I am going to ask you to answer it again, because I don't believe you have yet, Mr. Wallace.

Q. (Read as follows:) "Well, did price have anything to do with it, in your making the choice between sales arrangement and the agency arrangement?"—A. I can't answer that very definitely. I was not consulted.

Q. So to that extent then you are not adopting Mr. Gillies' testimony?

Mr. TUTTLE. I object to that.

Mr. Cox. Well, he either adopts it or he does not.

Mr. TUTTLE. No. He said he was not consulted.

The COURT. I don't think he has to, either.

Q. But you now say you were not a party to that decision which was made in 1933 by the officials of the company?—A. Correct.

Q. That is correct?—A. That is correct.

Q. And therefore you don't feel that you are competent to express an opinion about it?—A. That is right.

Q. At all times since 1933, so far as you know, the chief interest of your company has been in getting wide distribution of the product; is that correct?—A. That is right.

Q. Do you know whether the del credere agents ever appoint subagents to handle hardboard for them?—A. I imagine they do.

Q. Did you ever place any restriction upon the number of subagents they might appoint?—A. Yes; I think we have.

Q. When was that done?—A. Some time after 1936.

Q. Are you sure it wasn't done before 1936?—A. I don't think so.

559 Mr. Cox. You are not sure about that. Mark this for identification, please:

(Marked "Government's Exhibit 19" for identification.)

Q. I now show you Government's Exhibit 19 for identification, which purports to be a photostatic copy of a letter signed by

you, dated December 4, 1935, and addressed to the Insulite Company, Builders Exchange Building, Minneapolis, Minnesota, and I ask you to read it [handing]. Did you send that letter to the Insulite Company?—A. I did.

Q. Do you now have any present recollection as to whether, prior to 1936 you restricted the appointment of sub-agents?—A. That letter definitely says 1935.

Q. Do you know whether a letter similar to this letter was sent to any other del credere agents?—A. Yes, I believe it was sent to the Celotex Company, which had a similar agency but I think there should be some definition as to the kind of selling agents meant in that letter.

Q. Do you know whether you sent it to any other agent than Celotex—other del credere agents?—A. I think it might have been to all.

Mr. TUTTLE. May I have the witness' answer to the previous question about definition of agents?

(Answer read.)

By Mr. Cox:

Q. You think the term here needs definition?—A. I think it definitely does, as separate from a wholesaler or retailer or any of that type of selling agent.

560 Mr. Cox. I am going to offer this letter in connection with the testimony of this witness because it won't be comprehensible unless it is in the record. Is there any objection? (No response.)

I take it there are no objections.

(Government's Exhibit 19 for identification received in evidence.)

Q. Is the term "selling agents" which appears in the sixth line of this letter, what you think needs definition?—A. I just wanted to bring out the fact that that was a different type of trade outlet from manufacturers or wholesalers or retailers.

Q. In what respect was it different?—A. I have particular reference to Rocky Mountain Celotex Corporation. Whether that was a wholly owned or partly owned subsidiary of the Celotex Company at that time, I don't know. I know goods were consigned to them and they were handled the same as through the del credere agents—the same as del credere agents handled consignments of goods.

Q. You mean you sent the goods to them or Celotex consigned goods to them?—A. Through Celotex.

Q. Do you know to whom, in turn, that Rocky Mountain Celotex sold the goods?—A. I presume they sold the goods through the Celotex's own selling organization to wholesalers and dealers or to others that entered into the resale.

Q. That is the kind of selling agent that you wanted to limit it to in this letter?—A. That is correct.

Q. Do you know how many sub-agents of that kind del credere agents had in 1935?—A. I can think of three or four offhand, Paraffine Companies, San Francisco, Huttig Sash & Door in St. Louis, Rocky Mountain Celotex Company—I don't know
560 whether the name of this company is correct or not, Western Asbestos of Seattle, Washington. Those come to me at the moment.

Q. You think that is all there were, or were there more?—A. I don't know, but I think that is about all.

Q. Not more than a half dozen or so?—A. That is all.

Q. Is it still the policy of the Masonite Company to limit the number of sub-agents that del credere agents may have?—A. They haven't changed the letter.

Mr. Cox. They haven't changed the letter. I think I have finished, your Honor.

Re-cross-examination by Mr. TUTTLE:

Q. Did Masonite Corporation ever undertake to limit in any way the number of dealers and wholesalers that their agents might use?—A. No, sir.

Q. You have referred in answer to Mr. Cox's question to the fifteen or twenty other boards in 1933 that could be used for the same purposes as those boards, made of different substances, do you recall that?—A. Yes; straw, wood, wood fibers, cane fibers.

Q. They were not made according to the process by which hardboard was made, with the exception of the two that you sued for infringement?—A. That is right.

Q. When you say they could be used for the same purposes, I would like to know what you mean by "the same purposes"; do you mean as wall board, lining, and so forth?—A. That is correct.

Q. You are referring then to general purposes and not to——A. Not for special purposes.

Q. Not for special purposes, or the particular quality of the board itself?—A. That is correct.

Q. You mentioned tempered board as distinct from the boards that were not tempered; what did you mean by tempered board?—
A. A tempered board is the original untempered board put
562 through a bath of various oils, then put into a kiln and dried, which increases its water resistance and specific gravity and its density, which makes it a better board for certain purposes; it can withstand water better. While the other board will do it to some extent, this will make it do it much better.

Q. Does it increase its tensile strength, too?—A. Decidedly.

Q. It is merely an additional process that is applied?—A. That is correct.

Q. To the fundamental article?—A. That is correct.

The COURT. There are no more questions of this witness? All right, we might take a recess until tomorrow morning at half-past ten.

Mr. COX. Perhaps we might put these samples in the record.

The COURT. You don't need him to do that, do you?

Mr. COX. I don't think we do.

The COURT. They can be marked with their names on.

The WITNESS. Will you let me see the mark, please? [Same handed to witness.]

By Mr. Cox:

Q. These are samples of board which I understand that Masonite itself is now selling to its own customers?—A. Yes.

The COURT. Let me see it, just to get an idea what it is.

(Samples handed to the Court.)

The COURT. That is all. We will not take a recess until ten-thirty tomorrow morning.

(Adjourned to April 25, 1941, 10:30 a. m.)

563 NEW YORK, *April 25, 1941.*
10:30 o'clock, a. m.

TRIAL RESUMED

Mr. TUTTLE. Your Honor, yesterday I asked for samples, believing that they were in the courtroom. They were not. I have them here this morning, and I arranged with Mr. Cox that I may put Mr. Wallace back for the purpose of putting in our samples and giving some exposition concerning them.

ROBERT G. WALLACE, Sr., resumed the stand.

Mr. TUTTLE. Before taking up these samples, and in order that they may be more perfectly understood, I would like to put in some photographs of the process, for the purpose of illustration. Now in the first place, I will offer a picture of the plant at Laurel, Mississippi.

Mr. COX. That seems unobjectionable, Mr. Tuttle.

The COURT. Why shouldn't they all be attached together and marked as one exhibit?

Mr. TUTTLE. A very good idea. Let me count them. 19 photographs of the plant, and the machinery inside the plant, illustrative of the processes being used.

(Marked "Defendants' Exhibit B.")

The COURT. They will tell their own story. There is probably some legend on the back.

Mr. TUTTLE. There is a typewritten tab attached
564 to each, which gives an exposition. The first photograph,

with a little tab stating that it is the plant, and marked 1 on this exhibit, is a picture of the plant.

Recross Examination by Mr. TUTTLE (Continued):

Q. Now turning to the second photograph, marked 2 in this exhibit, together with photograph 3, will you tell us what those machines in the foreground are?—A. Those are the guns, or the steam retorts into which the chips are placed and then impregnated with steam. I believe up to approximately 1,000 pounds pressure, and by opening ports in the bottom of these retorts the difference in the atmospheric temperature explodes the original wood chip into a fibre mass.

Mr. Cox. Mr. Tuttle, are those the pictures that are labeled "Loaded Masonite Guns"?

Mr. TUTTLE. Yes, they are.

Mr. Cox. That is, 2 and 3.

Q. This is the next one, No. 4. Then is No. 4 a picture of the next step in the process?—A. This is in the forming machine. The fibre goes in here over this forming machine after it goes through refiners. A certain amount of refining is done there, and then it passes in here [indicating]. This is where the board is formed in the mass.

Q. This is formed with the aid of water carrying the substance along?—A. Water carrying the substance along.

Q. And now No. 5 is what?—A. That immediately follows No. 4, and is the wetlap with screens underneath allowing a certain amount of the moisture or the water that has carried the fiber onto the forming machine down through, and the lap then is cut and it goes into the press.

565 Q. That is disintegrated mass with water?—A. That is right. That is approximately; varying in thickness according to the thickness of the board you want to make.

Q. Now the next process is the introduction of pressure on the mass?—A. Well, this is a felt that immediately follows the wetlap, as we call it, or the material that is passing over the Fourdrinier wire, and this takes out some further water out of the wetlap before it goes into the heated presses.

Q. No. 7, next in order, shows the Fourdrinier machine plus the outside of the presses?—A. That is correct. This is the press section of the Fourdrinier. That is carried along here, and that is the previous screen or cloth that squeezes out a certain amount of water.

The COURT. What kind of wood do you use?

The WITNESS. We use either pine or hardwoods, mostly of second growth, a waste. In fact, it is all second growth except the hardwoods, which are not seconds.

Q. You said something about it being regarded as waste?—A. No; originally when it started we used a waste. This second growth of timber you might call waste for our purpose. It has no value as a building material.

Q. It is largely grown in the South?—A. Well, you find second growth all over, but this particular variety grows in the South.

Q. Now taking up No. 8 as the next in order, just state what that photograph is a picture of?—A. Well, this is a continuation of that same Fourdrinier machine carrying the board on after it has been cut into a 12-foot length, just before it goes on the rack, and that rack carries it into the press.

566 Q. And does No. 9 represent the process of going onto the rack, as you have just referred to it?—A. Well, that is a long view of the wetlap. It is moving up a roller conveyor, where it is cut. This is before it goes onto that movable and stationary rack.

Q. Now No. 10.—A. No. 10 is the stationary rack. As the board comes over off of that long conveyor there [indicating] it is cut into 12-foot 6-inch lengths, or some size just a trifle over. This man sits up on a rising platform and feeds boards in one at a time between these interstices or these sections in this stationary rack.

Q. And now No. 11—A. In order to convey it—this is your stationary rack that I have just explained to you, and in order to convey it to the presses, which are back in here, there is a monorail practically a duplicate of this stationary rack, but a monorail system, and with power there is 20 boards moved in there all at one time. There is gears engaged at the top and the bottom, and the rollers here, and they roll all the board, the wetlap, before it has gone into the press on this movable rack, which in turn carries it to the press.

Q. Now No. 12.—A. No. 12 is the actual press. That is loading it right here [indicating]. You see, here is your monorail and your overhead, and this is your press. All boards move into the open platens, 21 of them, and again we have a series of gears which engage the screen wire right over the bottom plate for making "Presdwood." On the top we have chromium-plated steel plates, in order to give it a smooth finish, get rid of any surface blemishes or anything like that. That is loading that particular press.

Q. And No. 13?—A. No. 13 shows three of the presses. Here is one actually being closed, each platen under hydraulic

567 pressure, all of the boards being under pressure and kept there under that pressure for a certain period of time in order to get certain densities for various uses for the finished product.

Q. Number 14.—A. Number 14 is a battery of presses. This press is open. This shows the steam or water being dispelled; water that originally went in the press. It comes out in the shape of steam and boiling water.

Q. All these presses are sized to take a 12-foot length and 4-foot width board?—A. Yes.

Q. Number 15.—A. Number 15 is a further view of these same presses. Here is the same as I mentioned, board going in on rollers. I cannot explain the details of the mechanics of the operation. It shows a screen on the base of the board, in order to permit the moisture to evaporate from the board into steam, otherwise it would stick to the plates. This is a fine screen and this is the water that passes out.

Q. Is No. 16 a picture of the presses in operation?—A. Yes; it definitely shows the rams and the presses closed. Here is the hydraulic ram for each of the presses.

Q. Number 17.—A. Number 17 shows a small section of the warehouse and all this particular type of piling apparatus. This permits the boards to be stored up to the roof. It is then stored so that it may be cut to four feet by eight feet or some other sizes. This machine—I don't know the name of it, but we call it a stacker. A man operates it and it carries the board up and down and onto a pile.

Q. Number 18.—A. Number 18 shows where some processing is going on, and probably laminations. There will be a glue line on these boards, one-ply, two-ply, or three-ply. For instances, here is an illustration of one manufactured for airplane processing. These boards are two inches in thickness and the boards are piled or stacked on top of each other.

Q. And finally, No. 19.—A. No. 19 is a long view of the warehouse. Pretty nearly all of the board now, particu-
568 larly tempered "Presdwoods," are wrapped so that even dust marks cannot reach them because they are liable to cause scratches on the surface and spoil the paint finish. This shows the section of the warehouse that might be used for some products packaged in hardboard cartons, and so forth.

Q. Now, I have in my hand 15 samples and stapled together on a pivot, are these samples of some of your products?—A. Yes, sir.

Q. Are they so put together as those samples are for any purpose?—A. Yes; so that the dealer can properly display them to prospective customers or the salesman can take them with him to show prospects.

Q. That is a package that is used by salesmen and dealers?—A. Correct. Otherwise, you see if you carry them separately, they will be lost or taken away, so they would be put in that form to show the dealer as a complete set at all times.

Mr. TUTTLE. I would like to have this package marked in evidence, so that we can use it for exposition.

Mr. Cox. No objection.

(Marked "Defendants' Exhibit C," consisting of 15 samples.)

Q. Now, this exhibit has on top of it a label for the package of samples which contains the words "Hardboard Products," that means all of these samples are hardboard products?—A. All these are hardboard products.

Q. Hardboard being spelled as one word?—A. That is correct.

Q. The other titles above that expression designate the different kinds of products that you put out under the name of hardwood?—A. That is correct.

569 Q. Now, suppose for the purpose of the record and for exposition purposes, you just run through them and give a little explanation as an introduction, but first let me ask, is each one of the samples marked with its particular name and thickness?—A. Definitely. 1/8th inch to 5/16ths "Presdwood"; "Standard Quartrboard"; "DeLuxe Quartrboard," 3/16th "Wallboard"; 1/8th inch "Temprtile," 3/16th inch "Temprtile."

Q. Some of those words you have just used are spelled artificially for trade purposes, are they?—A. That is right.

Q. Now, suppose you just take that package of samples and very briefly moving through them state the function each of them serves, if you can.—A. Well, the first one, your Honor, is a piece of 1/8th inch "Temprtile." This board was developed to provide or simulate a ceramic tile surface in a bathroom, in a grocery store or a meat market, or whatever the building might be where they were using it. It is a low-cost product. It is painted and finished when sold in this form on the job by the painter.

The second one is a sample of an 1/8th inch "Tempered Presdwood." This board was originally 1/8th inch untempered, when we first started to manufacture it, and then we developed the tempering process which I described yesterday. This particular board could be used inside for interior panel work or could be used outside. Generally it is not used in exterior to any extent, for the reason that it is not quite thick enough, although it has lots of strength, but they would rather use a thicker board where it has to stand weather and all the other factors that make a product go through severe tests. It will take those tests very definitely, any of them, and has been used in many cases up until we developed thicker board, for a lot of uses that the thicker board now excludes the 1/8th inch "Presdwood."

570 The next one is a second development as a 3/16th inch "Presdwood" board. This was a second step and a thicker board where more strength was required, and was originally manufactured in an untempered board. That is, the tempering, the

manufacture was exactly the same except that a bath of oil that I spoke of yesterday was used, which increased its density and its tensile strength and transverse strength and various other factors in it.

This board is used for exterior as well as interior work. It is being used in house construction for exterior walls at the present time. It is on the program for some of the new housing that we are reading about in the papers today.

It is also from this particular thickness board that we manufacture what we know as "Masonite Century of Progress Flooring." This board was originally used in one of the buildings at the Century of Progress in Chicago to floor halls in the General Exhibit Building, and gave us the idea of promoting a sale of it for general flooring purposes where they did not want to go to the cost of an oak floor or rubber floor.

The next one is ¼ inch "Tempered Presdwood," which was an additional development and was manufactured originally and primarily for lining concrete forms—not so much lining the concrete forms as its thickness made it more resistant against hydrostatic pressure of water and concrete, and made it possible for the contractor to eliminate some of the backing lumber that he had to use on forms. When he originally started he used ⅛th inch untempered or ⅛th inch tempered, and he had to line the form first with ⅞th inch lumber and then just simply used the "Presdwood" as a liner. It was used in construction work, particularly concrete form work, and in some interiors or exteriors to eliminate plaster and things of that nature.

571. Since that time this board has developed into a lot of sales through the dealers, jobbers, for many other purposes besides concrete forms.

The 5/16ths was a further development, that is the next sample, and shows here as "Tempered Presdwood," as I come to it. This originally was used for concrete forms. Since that time, on account of its thickness, we have been able to manufacture and sell baseboards made out of it, such as the round part at the bottom of walls, moldings, and various other things, and it is used in some specialized industries.

Both the 3/16ths and ¼th and 5/16ths are used in billboards and truck bodies. On the lighter cars the ⅛th inch and 3/16th inch are used.

And then there was a demand for the next board, which is "Black Tempered Presdwood." A demand came from manufacturers of kitchen equipment, and somebody wanted a surface on a desk and did not want to put extra coats of paint on, and they might want to use clear lacquer, and that is being sold now also through dealers for a great many other uses that I don't know of.

but it is definitely a board for table tops for restaurants and places of that nature.

The same thing is true of the green. Those two colors, with the brown, seem to be a range of colors that are most acceptable for sale in the industries that I have mentioned—the manufacturer of desks, kitchen cabinets, and things of that nature.

The next sample is 1/8th inch untempered "Presdwood." Now its use is practically confined to paneling and interiors and, for certain things it is used, the second quality and offgrade stuff, some board is still used in automobile body work and things of that kind.

My previous comments on the tempered 3/16ths would also cover this 3/16ths untempered board. It is simply an
572 additional thickness with more strength than the 1/8th inch. The same is true of the 1/4 inch and the 5/16ths.

The next sample is a board that we developed last fall called "3/16 Walboard," purely for interior linings and army camps and things of that nature, and displaces the standard "Quartrboard," which I will come to. It is purely an interior board.

"Deluxe Quartrboard" was a development after standard "Quartrboard" had been introduced, to give a denser and a harder surface and more strength than standard "Quartrboard." This is a board that is still in the line and has considerable use in interiors and show window work. Department stores use it for window bulkheads and partitions and displays and things of that nature.

"Quartrboard" was one of the original three products. It has now been taken out of the line because the 3/16ths inch "Walboard" which was put into the line, you can see how smooth the surface is, more dense and has a better painting surface and therefore takes less paint and a more economical board to use in every way.

The last one is 3/16ths inch "Tempered Presdwood Temprtile." This board is simply an increase in thickness over the 1/8th inch where greater strength is required, and is used, as I have said, in baths, grocery stores, and department stores, where they want sanitary finishes to simulate tile.

Q. What is the backing on this?—A. This backing is that screen that I showed you in those presses, to permit moisture to escape from the wetlap after the wetlap has been put into the press.

Q. Well, is it cloth or burlap?—A. No; it is a wire screen, a screen wire cloth, and the impression stays in the board until it is completely manufactured, and there is no way to eliminate it.

573 By Mr. TUTTLE:

Q. References have been made here constantly to insulation board in contradistinction to hardboard. I show you a

board and ask you whether that is a sample of insulation board?—A. It is ½-inch Masonite insulation board.

Q. And it differs from hardboard in various respects?—A. Density, surface, and various other factors. It is used for wall-covering material as the other boards are used, but it gives resistance against certain sound conditions plus insulating value.

Q. By insulating value you mean against heat and cold?—A. Yes; insulating value against heat and cold.

Q. Now, there is a great difference in weight because of the difference in density; is that not the fact?—A. Yes; the board is probably the lightest board we make. There is some difference between that, naturally a great difference between that and the thickest "Presdwood."

Q. Yes. Now, from the point of view of fire, what is the difference between hardboard and insulation board?—A. I really can't give you the answer to that. I know that "Presdwood" is definitely more fire-resistant than insulation board. As to the number of minutes that one will take over a Bunsun burner as against the other one, I don't know, but naturally on account of its density it would be more resistant.

Q. And whereas hardboard resists weather and decay due to moisture, insulation board is liable to the ill effects from water?—A. Well, it hasn't the water resistance naturally that the "Presdwoods" have, but it is water repellant, there is no question about that. There is a possibility that there might be dry rot on it or something like that, but I think it is still a pretty good board.

Q. Naturally, but from the point of view of durabil-
574 ity?—A. "Presdwood" would naturally be more durable, I imagine, over a long time.

Mr. TUTTLE. I will ask to have this sample of insulation board marked in evidence.

Mr. COX. No objection.

(Marked "Defendants' Exhibit D.")

Q. Now, with reference to competing products, in the sense that artificial board made out of other substances in other ways may serve similar or like purposes, I am sending for a few just for illustration purposes. Are you familiar with or have you been in the Architects Building here in New York?—A. No; I have not.

Q. At 40th Street and Park Avenue?—A. I have never been in it.

Mr. TUTTLE. If your Honor will bear with me for just a moment, we will get them here.

Q. Just as one illustration of how, after certain processing, this hardboard can be used we will say for bathroom purposes I will show you this sample which bears the label of the Arm-

strong Cork Company, but which is your hardboard, with a finished surface put on it. Which one of those samples that you have already put in evidence and described does that correspond to?—A. Well, it would be done on any "Presdwood," and the same thing could naturally be done on "Temprtile."

Q. Yes.—A. "Temprtile"—that is, you can put a hard paint finish on any of the tempered boards, whether it be "Temprtile" or standard "Presdwoods."

Q. Well, that is the way that tile made out of hard-
575 board would look if put around a bathroom in the usual way that ceramic tile is put around; is that not the fact?—A. I should say close to that. That is factory finish.

Q. It comes in various colors?—A. It can be painted to any color.

Q. Yes?—A. Any color that the owner desires.

Q. Mr. TUTTLE. Well, just for illustration, I don't intend to put in too many of these, I will offer that board that I have just spoken of in evidence.

Mr. COX. No objection.

(Marked "Defendants' Exhibit E.")

Mr. TUTTLE. While we are waiting for some additional samples, I will ask a few questions.

Mr. TUTTLE. Just as an interlude, in order to correct some testimony that has already been given, I want to put in evidence the code of fair competition for the insulation board industry, as approved on March 22, 1934, under the NRA. Mr. Gillies thought that it had not been approved, but I wish to show that it had been approved. No objection?

Mr. COX. I don't object to it. I am not conceding its relevancy, of course.

I wonder if there is any way we could determine when that code ceased to be effective. Did it cease to be effective on the 25th of May 1935?

Mr. TUTTLE. If you will give me a chance to check that date.

Mr. COX. That is the date of the decision of the United States v. Schechter Bros.

Mr. TUTTLE. Then I will concede it.

576 (Marked "Defendants' Exhibit F.")

Q. Now, the hardboard which you shipped to these agents, defendants here, and which was sold through them to customers, was the identical hardboard in its various varieties that you were selling direct to customers?—A. Correct.

Q. Both in quality and in make?—A. That is right.

Q. And, of course, in the same sizes, except as they might be cut pursuant to the orders received?—A. That is right.

Q. I notice at page 167 that there was no direct answer to a question which I asked, although my memory is that you did answer it. I will put the question again, and see if you can give me a categorical answer.

"Q. May I put it this way: the generic name for that product was 'hardboard,' but you differentiated the varieties by putting another name in front which was frequently used alone, without the generic name; is that correct?"—A. That is correct.

Q. Now, very briefly I would like to offer a few samples of artificial board and have you identify the character thereof. Taking Exhibit C here, the very first sample in that pile of 15 samples to which you have referred, let me by way of comparison show you Johns-Manville decorative "Flexboard." They make that, do they?—A. They do. I was told they do, and sell it.

Q. And put it out in the trade?—A. Yes, sir.

Q. And does it operate in the trade in competition with a corresponding board made by you?—A. Yes; naturally would.

Q. Both discharging some of the same functions?—A. That is correct.

577 Q. Do you know what that is made of, the Johns-Manville decorative "Flexboard"?—A. No. I know there is asbestos in it, but I don't know what other component parts.

Q. It is not made according to your process at all?—A. No.

Mr. TUTTLE. I offer this in evidence as Defendants' Exhibit G. (Marked "Defendants' Exhibit G.")

Q. Yesterday you testified that in a certain Club at Laurel, Mississippi, Johns-Manville succeeded in putting "Flexboard" on the walls, right under the nose of your plant. Is this an example that I now show you of this "Flexboard"?—A. That was not a club; it was the Pinehurst Hotel.

Q. Oh, a hotel. Your answer is yes?—A. Yes; it certainly looks like the exterior surface. It is.

Q. And it consequently competes with some of your products as shown in Exhibit C?—A. Definitely competes with all the "Presdwood" products, and all the rest of them as far as that is concerned.

Q. And that is made, as far as you know, of what? Asbestos?—A. Probably some asbestos fiber in it. I don't know the other component parts of it.

Q. It says on the back of it here "Asbestos cement sheets for use as an inexpensive wall finish."—A. Well, I imagine that is a true description of it.

Q. By the way, your products, taken by and-large, are in the inexpensive field, are they not?—A. Most of them. Some of them are higher in price.

Q. Just to illustrate the similarity in use but the consider-
578 able difference in price, your "Temprtile" which is used for bathroom purposes, has the outward and visible appearance of ceramic tile, hasn't it?—A. To a considerable extent; yes.

Q. I won't offer in evidence any ceramic tile because everybody knows what it is. Yours is very much cheaper in price, isn't it?—A. That is right.

Q. Yours being a very much cheaper product?—A. Yes; it is less than one-half, I guess.

Q. Now getting out of wood, artificial or otherwise, as a competitor with your products, I show you a piece of tile, that is a metal tile, isn't it?—A. Yes.

Q. And does that metal tile compete with your "Temprtile" in the industry?—A. Naturally it would, because it is used for the same purpose.

Mr. TUTTLE. I offer that just as a sample—the metal tile.

(Marked "Defendants' Exhibit I.")

Q. Then just as a further illustration a "Smith Board," that is used for tile and lining purposes, isn't it?—A. That is correct.

Q. Is that a sample of it?—A. It looks like a Magnasite board. I don't know what it is, or the name of it.

Q. If you are not familiar with it, I will lay that aside. Are you familiar with Sheet Rock Hardboard, of which I show you a sample?—A. Yes.

Q. What is that made of, and who makes it?—A. That is a kind of gypsum, paper covered, I judge, manufactured by all the gypsum companies—the National Gypsum Company, Paraffine, and there is also Certain-teed that has gypsum deposits, and which make gypsum parts. I don't know whose particular name this is. I notice the trade-mark, United States Gypsum Company.

579 Q. Does that gypsum board in its various varieties compete with your hardboards in the building industry?—A. Yes; all of them.

Q. And they can, in many ways, be used as substitutes, one for the other?—A. That is right.

Mr. TUTTLE. I offer this in evidence.

(Marked "Defendants' Exhibit J.")

Q. The sample which I now show you is another kind of gypsum board, is it?—A. Yes.

Q. And put out by the same companies?—A. That is right. Most of the gypsum companies, I imagine, make the same competing boards.

Q. And that, in its various forms, competes with your products in their various forms?—A. That is correct.

Mr. TUTTLE. I offer that in evidence.

(Marked "Defendants' Exhibit K.")

Q. Now, there are various artificial boards on the market made out of paper or wood pulp in the paper stage, but under pressure?—A. I don't believe so. In most instances not.

Q. Let me show you this Cornell Wood Products Company sample, do you know that?—A. I am not familiar with the process of making this. I haven't been in those mills.

Q. Do you know the product itself?—A. Yes; I know the product.

Q. It is made out of paper?—A. It is made out of paper pulp fiber.

580 Q. What is it used for?—A. It is used for wall covering; used for bathrooms. This particular one, because it has the tile identations on it, can be painted and handled the same as any other board.

Q. So it is in competition with your products in the building industry?—A. That is right.

Mr. TUTTLE. I offer that in evidence.

(Marked "Defendants' Exhibit L.")

Q. Does glass itself compete with your products at all?—A. Definitely, for bathrooms, store fronts, store interiors, and various other things.

Q. Glass is made up for such purposes, is it?—A. Yes.

Q. I show you a sample and ask you if that is an illustration of glass serving the same functions as some of your products?—A. That is correct.

Q. And competing with your products?—A. Yes, sir.

Mr. TUTTLE. I offer that sample in evidence.

(Marked "Defendants' Exhibit M.")

Q. In order to close this subject, let me ask you these general questions: I suppose there are all kinds of boards which carry a wood or wood-like finish as a veneer?—A. That is right.

Q. For example, plywood?—A. Plywood—all plywood.

Q. Will those products serve the purposes of light, floor and ceiling and other structural purposes?—A. Yes.

Q. And compete, do they, with your products?—A. Yes.

Q. And, of course, natural wood does, too?—A. That is right. Plywood is one of our biggest competitors.

Q. It has been suggested that I illustrate your response
581 by making one final offer, that is, a piece of plywood as a veneer; is that a sample of that character?—A. Yes, sir.

Mr. TUTTLE. I offer that in evidence.

(Marked "Defendants' Exhibit N.")

Q. There is one question associated with this that I intended to ask you about when these samples were here, and that is, do you know whether or not there was, during the last few years,

and I will fix the period later, a rise in the general price of building materials in the building industry?—A. Definitely there has been a rise.

Q. During what period has that increase been proceeding?—A. I don't know that I can name the definite time, Mr. Tuttle, but for the last five years anyway.

Q. And has it been a progressive rise?—A. It has, up to the present time; yes.

Q. Due to the rise in cost of materials?—A. Cost of materials and cost of labor, and various other factors.

Q. You stated yesterday that the general trend—speaking of trend—of prices of your product has been downward, or at least on a level during this period.

Mr. Cox. I object to that.

The Court. Objection sustained.

Q. Can you tell me what, during that period of five years, has been the trend of your products from the point of view of price?—A. Well, they have been generally on a level, except for a small increase.

Q. And has the increase in building materials, outside of your products, been less *great or as great or greater*, taking them by and large?

582 Mr. Cox. I am going to object.

The Court. Sustained.

Mr. Tuttle. That is all. No more questions.

Mr. Cox. I want to ask one or two questions about this exhibit which has been marked Exhibit C.

Redirect Examination by Mr. Cox:

Q. These samples are samples of the hard board which was delivered to your del credere agents; is that correct?—A. Yes, sir; and sell ourselves.

Q. And it is also the same hard board you sell to your own customers?—A. That is right.

Q. Tell me whether prior to the 1st of April 1941 the hard board which you delivered to the so-called del credere agents carried the slogan which appears on the bottom of the first of these samples, which reads "Masonite Trade Mark Reg. U. S. Pat. Off. Tempered Presdwood 'Trade Mark Reg. U. S. Pat. Off.'"—A. That mark is our own mark for our own particular samples and products.

Q. So that that mark was not on the hard board delivered to the del credere agents?—A. It was not.

Mr. Tuttle. You don't mean the reference to the patent?

Mr. Cox. No; I thought it might be.

Mr. Tuttle. There is no question between us that the reference to the patent was on all the boards.

Mr. Cox. I understand the testimony was yesterday that the patent number with reference to the patent is on all boards.

Q. You testified this morning about competing materials, Mr. Wallace. You also recall that you testified yesterday about
583 substitute boards of various kinds. Do you recall that testimony yesterday about the period in 1933?—A. That is right. I meant substitute boards for uses.

Q. You referred to an Upsom board. Do you remember that?—A. Yes, sir.

Q. What is Upsom board?—A. It is practically identical with that Cornell board.

Q. This Cornell tile board?—A. Well, they make a tile board as well as just a straight flat shape.

Q. Do you know what the weight of this is per cubic foot?—A. I wouldn't. I wouldn't even guess, because I don't know.

Q. Now you also referred to a Compoboard. Do you recall that reference?—A. Yes.

Q. Are any of these samples here comparable to Compoboard?—A. None.

Q. What is Compoboard?—A. Compoboard is a board with a wood interior and hard paper surface, all built up, as I call it, of small pieces of board.

Q. What was it used for in the industry?—A. Well, it was used for interiors and wall linings and various general purposes.

Q. Was it used for exterior coverings of any kind?—A. No.

Q. Was it capable of any use in which it would be subject to moisture, that you know of?—A. I think it could withstand moisture to a reasonable degree.

Q. Is it as resistant to moisture as your hard board?—A. I don't think so.

Q. Is it as durable as your hard board?—A. That would depend on the use. It is a hard question. For the interior of a room, yes.

Q. Suppose it was used in a position where it was exposed to moisture. Would it be as durable as your hard board?—A. I don't think it would be put there.

584 Q. Do you know whether "Compoboard" was ever used for flooring?—A. I don't think so.

Q. Do you know whether "Compoboard" was ever used for subflooring?—A. It might be used for subflooring.

Q. Would it be as durable if used for subflooring?—A. For subflooring; yes.

Q. Was it ever used for ceilings?—A. Yes.

Q. Would it be as durable?—A. Yes.

Q. Do you know whether "Compoboard" was ever used in the automobile industry in the manner which you testified yesterday?—A. Yes; it might be used for floor boards.

Q. But as far as you know it was not used for hard boards; is

that your answer?—A. As far as I know I never saw it used in the automotive industry.

Q. I have in my hand Exhibit L, which is the Cornell "Tileboard." Do you know whether that is ever used for flooring?—A. No.

Q. It is not. Is it ever used for an exterior covering of any kind?—A. If it is, it is only temporary.

Q. If it is used as an exterior covering is it as durable as your hard board?—A. No.

Q. Now I have in my hand Defendants' Exhibit M, which is a structural glass made by the Pittsburgh Glass Company. You recall that?—A. Yes.

Q. What is that used for, specifically?—A. Bathroom walls, partitions between toilet stalls. It is used a great deal for outside store fronts. It is one of the new vogues. Carrara glass, and various other products are used in place of other materials. These are some of the other things used for our products.

Q. Do you know whether it is ever used for flooring?—A. I don't like to say yes, and still I believe I can remember seeing it used.

Q. You remember one instance?—A. Yes. I don't believe it is generally used. Maybe; I don't know. But I believe it is used entirely for walls.

585 Q. Do you know whether or not it is ever used for ceilings?—A. Yes; it has been used for ceilings.

Q. Is that a general use?—A. Store fronts and baths and various other purposes.

Q. It is used as fronts for stores, you say, too; is that right?—A. Yes; it has been used on the exterior.

Q. Now one more of these. I have Defendants' Exhibit N, which is a product of the United States Plywood Corporation. Do you recall that?—A. Yes.

Q. Do you know anything about the weight of this board per cubic foot?—A. No; I do not. I imagine it would be close to the weight of our 1/8th or 3/16ths. I don't know how much less it would weigh, or anything of that kind, but it would be close. I have never weighed any of it, or paid any attention to the weights.

Q. Your present judgment is that it approaches the weight of that one?—A. Somewhere within reasonable distance of it.

Q. Am I correct in assuming from your answer that your view is it probably weighs a little less, but not much?—A. I don't know, but I think probably it may weigh a little less.

Q. Now, Mr. Wallace, I call your attention to Paragraph 19 of the stipulation of facts, which I show you. You see that list of commodities in the third sentence of the paragraph. It starts out, "There are other materials."—A. Yes.

Q. Then do you see the sentence which follows that, which reads as follows:

"No one of these commodities is fully capable of being put to all the uses for which hardboard in its various forms is suitable, but one or more of these commodities is capable of being put to each use for which hardboard in its various forms is suitable."

586 A. That is right.

Q. Has it been your intention in your testimony this morning to contradict that sentence in any way?—A. I didn't know anything about this sentence.

Q. Do you accept the sentence as an accurate statement?—A. May I check it?

Q. Certainly. You read it again and consider it.—A. Well, I say very definitely that plywood, some of these boards, could be. I don't know about the construction of that sentence. If they were used for an exterior partition, or for wall lining, a coat of paint on them would be the same as a coat of paint on "Presdwood" or any of our other products.

Q. Am I to understand from your answer that you do not accept the statement as an accurate statement?—A. With that exception.

Q. With the exception of plywood?—A. Plywood, and some of these other boards.

Q. Now, what other board?—A. Wallboards.

Q. What kind of wallboards?—A. Cornell.

Q. You mean this paper Cornell?—A. That is right. They could be placed on the interior of a room and painted.

Q. You mean this is a complete and adequate substitute for hardboard, Mr. Wallace?—A. For certain purposes, yes.

Q. But not for all purposes for which hardboard is used?—A. That is correct.

Mr. TUTTLE. Mr. Cox, there need be no difference between us as to the construction of that sentence, and in no way, as I see it, has the witness's testimony been contradictory of it. I don't think you pointed out that that sentence takes all the possible functions.

Mr. Cox. That statement I am glad to accept.

Mr. TUTTLE. Taking all the possible functions, those
587 functions in the total are not served by any other product? That would be true, wouldn't it?

The WITNESS. Yes, sir.

Mr. Cox. I take it, then, that you do not construe the witness's testimony as contradictory?

Mr. TUTTLE. Not in the slightest.

Mr. Cox. Very well. I am finished.

The COURT. That is all.

Mr. Cox. Before calling my next witness I should like to state that the day before yesterday I asked counsel for Masonite Company whether they would make a search to determine whether Mr. Gillies in 1933 received any written communications from the receivers of the Celotex Company, or from the counsel for the receivers, prior to the execution of the agreement between Masonite and Celotex on October 10, 1933.

Mr. TUTTLE. Mr. Cox, will you permit me to report on that immediately after the lunch hour?

Mr. Cox. I understand, or I have been informed, that a search has been made and that no communications of that kind have been discovered.

Mr. QUARLES. We found none in the files.

Mr. Cox. I should also like to say that counsel for the Masonite Corporation has agreed that I may read into evidence certain figures which he has been kind enough to supply me with respect to the sales of insulation board made for certain periods, which I shall now designate.

Mr. TUTTLE. By whom?

Mr. Cox. By Masonite.

588 For the fiscal year beginning on September 1, 1932, and ending on August 31, 1933, Masonite sold 14,196,596 feet of insulation board with a dollar value of $405,817.22.

Mr. TUTTLE. You are referring to square feet?

Mr. Cox. Square feet, I take it. That is not indicated here.

For the fiscal year beginning on the 1st of September, 1933, and ending on August 31, 1934, Masonite sold 15,982,041 square feet of insulation board with a dollar value of $492,216.71.

For the ensuing fiscal year beginning on September 1, 1934, and ending August 31, 1935, Masonite sold 28,517,976 square feet of insulation board with a dollar value of $866,158.10.

I am informed that in each of those years approximately one million square feet of the footage shown in each case was purchased by Masonite from other manufacturers.

Mr. QUARLES. That is correct, Mr. Cox, and the footage measurement is on a half-inch basis.

BROR G. DAHLBERG, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Mr. DALLSTREAM. If the Court please, Mr. Cox is agreeable to my making one remark in the record about the last figures which were offered.

We would like to have the record show that the dollar price figures which have been used for the purpose of that computation is the amount collected by Masonite from its customers for this insulation board plus the freight allowance made by Masonite which was added to the net increase of its receipts.

589 Direct Examination by Mr. Cox:

Q. Mr. Dahlberg, what is your present occupation?—A. President, The Celotex Corporation.

Q. How long have you held that position?—A. Since its organization in 1935.

Q. And what did you do before that?—A. Before that, from 1932 to 1935, I worked for the receivers who had charge of the Celotex properties.

Q. What did you do before 1932?—A. I was president of The Celotex Company, which was the company then in existence.

Q. Mr. Dahlberg, I am going to hand you a copy of the stipulation of facts, which I think may be of assistance to you. Now, what were your duties prior to 1932, in your position with Celotex Company?—A. President.

Q. What did you do as President? What was the general range of your duties?—A. Well, I was chief executive officer of the corporation.

Q. And what was the business of the company in that period, take it from 1928 to 1932?—A. Its business was the manufacture and sale of building materials, principally of so-called insulation board and hardboard. We made that insulation board and hardboard at Marrero, Louisiana, near New Orleans, Louisiana. In addition to that we handled various other types of building materials, such as blankets, insulation blankets, wallboards of various kinds made of wood in various ways, and different odds and ends in the building line.

Q. You made these various products you have described and distributed them; is that right?—A. No. Our principal manufacture was the hard board and the insulation board.

Q. I see.—A. The other we handled as factors for other manufacturers.

590 Q. So that the products which you made and sold yourselves were insulation board and hard board; is that correct?—A. Yes, sir.

Q. And you had a selling organization at that time?—A. Yes, sir.

Q. Do you recall how large it was?—A. Yes. It covered sales-wise and promotion-wise, the entire United States; we had about 200 to 250 salesmen, some ten thousand dealers, and it was our claim at the time, which was correct, that we were the only building material company that covered every county and every village in the United States.

Mr. Cox. Will you mark this for identification?

(Marked "Government's Exhibit 20" for identification.)

Mr. Cox. I now offer in evidence a table which shows the production by the Celotex Company of hard board products from the month of May in 1929 through the month of October in 1933. These figures, I understand, represent square foot measure, which

has been computed on the basis of the production measure, irrespective of thickness; is that correct, Mr. Dallstream?

Mr. DALLSTREAM. Will you make clear for the record that the production and sales was by the Celotex Company until the time of receivership and thereafter until the close of the period shown on that sheet by the receivers?

Mr. COX. I include that amendment of the description to the document I now offer in evidence.

(Government's Exhibit 20 for identification received in evidence.)

391 Mr. COX. Mr. Dallstream, do you have your samples of the hardboard products which were sold by Celotex in 1933?

Mr. DALLSTREAM. Yes [handing samples to counsel].

The COURT. We will take a short recess.

(Short recess.)

Mr. COX. I now offer eight examples of board and I suggest that they be marked with one number and letters following the number, if that is satisfactory, of samples of board manufactured by the Celotex Company, and I include in that when I say Celotex, the operations which were carried on with the receiver, with your permission, Mr. Dallstream, from 1929 to 1933. The examples are arranged in chronological order.

(Marked "Government's Exhibits 21-A to 21-H" inclusive.)

Mr. DALLSTREAM. May the record show those are samples only of the hard panel board and do not include any insulation board products.

Mr. COX. That is correct, as I understand it.

Q. Mr. Dahlberg, can you identify these documents which I show you?—A. I can.

Q. What are they, Mr. Dahlberg?—A. Price lists of the Celotex Company or the Celotex Receivers quoting prices on hard board at various periods of time, as indicated by the exhibits. They appear to be from 1931 to 1934.

Mr. COX. I offer these in evidence.

(Marked "Government's Exhibit 22.")

392 Q. In 1932, Mr. Dahlberg, do you know the names of any other companies which were engaged in manufacturing insulation board?—A. In 1932?

Q. Yes.—A. Yes.

Q. What companies were so engaged at that time?—A. The Insulite Company, Wood Conversion, the Agasote Company, Armstrong Cork or Armstrong-Newport, Masonite—a company up in Maine whose name has escaped me now but they are now United States Gypsum, and the United States Gypsum.

Q. Can you recall the names of any other company?—A. No. Wait a minute, the Hawaiian Cane Products Company up in

Hawaii, and the Fir-Tex Company in Portland, Oregon. I think that perhaps covers it.

Q. Do you think now you have named all of the companies which produced any substantial amount of insulation board at that time?—A. I think so.

Q. You have seen these examples of the board which your company was producing between 1929 and 1933, have you not?—A. Yes, sir.

Q. Do you know to what uses this board was put in 1932 by the persons who purchased it from you?—A. Well, it was used for interior finish of walls and ceilings and used for forms.

Q. You mean in which to pour concrete?—A. For concrete forms; it was used for forms for foundry work; it was used in the moving picture industry to make forms in sets; then there were a miscellaneous lot of uses for floors, particularly temporary floors; partitions of all kinds and in the general building business.

Q. Do you know whether at that time any of it was used in the furniture business, in any way?—A. Not our board. I am quite sure we never got out a product that was acceptable to the furniture business.

593 Q. Was any of it used in the motorcar industry at that time, do you now recall?—A. I am sure there was not.

Q. Now, Mr. Dahlberg, I call your attention to the paragraph of the stipulation which you have there, I think it is paragraph 31. Do you see that paragraph that refers to the receivership?—A. Yes, sir.

Q. Do you see the second paragraph in that paragraph which refers to Mr. Colin C. Bell and Mr. Hobart P. Young?—A. Yes, sir.

Q. Do you know what business or occupation Mr. Young was engaged in when he was appointed receiver?—A. Attorney.

Q. Do you know what Mr. Bell's business was at that time?—A. Attorney.

Q. Do you know whether, prior to the appointment of Mr. Young as receiver, he had ever been engaged in the insulation board business in any way?—A. Yes, sir.

Q. He had?—A. Yes, sir.

Q. In what connection?—A. His firm had been the counsel for Celotex since its organization in 1920.

Q. I see. He had been the counsel for the company which was in receivership?—A. Yes, sir.

Q. And had Mr. Bell ever had any previous connection with the insulation board industry?—A. No, sir.

Q. So far as you know?—A. Not so far as I know.

Q. Where did Mr. Bell live, do you know?—A. In Wilmington.

Q. Where did Mr. Young live?—A. Chicago.

Q. Now, you testified, I believe, a moment ago that in 1932

when the receivers were appointed, you were the president of The Celotex Company; is that correct?—A. Yes, sir.

Q. Did you resign from that position after the appointment of receivers?—A. No, sir.

594 Q. Was there any change in your duties at that time, Mr. Dahlberg?—A. Yes, sir.

Q. Now tell us what that change was.—A. Well, prior to the receivership, I was president and as such was more or less the final word on what was to be done in the company subject, of course, always to approval by the board of directors. After the appointment of the receivers, I found myself, greatly to my dismay, more or less in the position of an office boy to Mr. Young and to his counsel, Mr. Lutkin, so that while I continued to do the mechanical things, all decisions, important decisions, practically all decisions affecting any change in men, in organization, all had to be passed on and they were passed on by Mr. Young. I recommended things to Mr. Young, and if he liked them, he told me to go ahead, and if he did not, which was quite frequently, he said, "No, nothing doing."

Q. Do you think he turned you down more times than he accepted your recommendations?—A. Oh, no; I would not say that.

Q. You would not say that?—A. No, sir.

Q. Would you say in most cases he accepted your recommendations?—A. I would say that; yes, sir.

Q. Now, what change did it make in your duties, other than the change which you have described? Did it change your duties in connection with the carrying on of the day-to-day business of the company?—A. No, I would not say that. It did have one material change in that all of the people under me felt that, instead of working for me, which they did before, they felt they were working for somebody else. That was quite a radical change in the administration of the business.

Q. But is it your testimony now that you continued to administer the details of the business, the operation of the business?—A. Yes, sir; it is.

595 Q. And you consulted with the receiver, however, on all questions of policy?—A. On all questions of policy and all questions of organization, men, and he kept himself pretty well informed and I kept him well informed.

Q. You are now speaking about Mr. Young?—A. Mr. Young.

Q. Did you confer with Mr. Bell frequently?—A. No, sir.

Q. Would you say that Mr. Bell was as actively engaged in supervising the conduct of the business as Mr. Young was?—A. I would say that he was not.

Q. Now, do you recall whether in the year 1932 at any time you saw Mr. Gillies?—A. Yes, sir.

Q. Do you recall when in that year you saw him?—A. Oh, I think it was—I would say it was probably August or September, following the date that Judge Nields decided the Masonite-Celotex suit in favor of Celotex.

Q. Where was that meeting held?—A. As I recall it, it was at a meeting of the Insulation Institute, of which at that time I was chairman. I think Mr. Munroe with his face beaming came in and said——

Q. Came in where?—A. Came into the meeting.

Q. Came into the meeting.—A. And said that Judge Nields had upheld Celotex and rendered a decision in its favor. At the close of the meeting Mr. Gillies said—now wait a minute.

Q. This is 1932?—A. Yes; 1932.

Q. This is 1932 I am asking about, not some later time.—A. Or 1933. Yes; 1932. He said, "Let us have a talk about it," or something like that, or "We will see you later," and so on and so forth.

Q. Did you have a subsequent talk with Mr. Gillies?—A. Subsequently, as I understand it, we had a talk, three or four weeks thereafter, or some days thereafter.

596 Q. Where was that talk?—A. That was, according to my recollection, in the office of Mr. Huxley, patent counsel for—now wait a minute. I am getting the conferences mixed up. No; that was in my office.

Q. And who was there besides yourself?—A. Mr. Gillies, Mr. Alexander. I think during part of the time Mr. Munroe came in to answer some questions. Mr. Hampson might have been there to answer a question or two, but was called in.

Q. You have named now all the persons you can recall as being there; is that right?—A. Yes; that is right.

Q. And this meeting that you are speaking of now took place how long would you say after the decision of Judge Nields?—A. Oh, I would say pretty soon thereafter.

Q. Now you recall, as it is set out in the stipulation, that thereafter there was a decision by the Circuit Court of Appeals, do you not?—A. That was the next year, as I recall it.

Q. That was the next year, in 1933. Now do you recall whether you talked to Mr. Gillies in 1933?—A. Yes, sir.

Q. When in 1933? Do you remember?—A. I don't know. That is so long ago.

Q. Well, do you remember whether it was before or after the decision of the Circuit Court of Appeals?—A. It was after the Circuit Court of Appeals deci. on.

Q. Where did that conversation take place?—A. In my office.

Q. And who was present at that conversation?—A. Mr. Gillies.

Q. And no one else?—A. I don't think so.

Q. Do you remember what you said to Mr. Gillies at that meet-

ing?—A. I remember a meeting with Mr. Gillies in the fall of 1933, after the Circuit Court decision. I remember it dis-
597 tinctly, because I was just leaving for New York. Mr. Gillies came in and said, "How would you like to have Masonite manufacture hardboard for you? In that way you can get what you want in the way of hardboard. You can sell it for us, and we can get distribution which we need. We have to have mass production."

I said, "That sounds interesting, but I don't quite understand what it is that you are talking about. What is the plan? So far as we are concerned we are going ahead with the prosecution of the suit. Mr. Young has instructed the attorneys to file a writ or application for rehearing. If that is not granted he is going to file an application for a writ to the Supreme Court, and we don't think we are licked by an awful jugful."

The COURT. You were just whistling to keep your courage up?

The WITNESS. That is just about the situation. Also——

Q. Just a moment. Do you mean to say you didn't really mean those things you told Mr. Gillies?—A. No, no. I meant every word, that we were going to file for a hearing. We did. We did apply for a certiorari.

Q. All right, go ahead.—A. Mr. Young, with whom I discussed this many times, took the position that our chances were pretty slim, that as a lawyer he would not give much for our chances in the Supreme Court on a writ. I didn't tell that to Mr Gillies. I had tried to impress Gillies with the idea that it was a thousand-to-one chance that he might win in the Supreme Court. There was no idea of our losing at all, because in my opinion—and I pointed that out to Gillies—the opinion of the Circuit Court was
598 so conflicting that until you got to the last two lines you would think they were going to decide in favor of Celotex. But in the last two lines they say, "Nevertheless," or something to that effect, "we hold it valid."

So I said, "If you have got any plan, I will be glad to submit it, but what becomes of costs, and what becomes of an accounting?"

Gillies made a statement, or was reported to have made a statement to somebody who reported the statement to me, to the effect that when Masonite got through with us they would own us body and soul, because they would collect treble damages, etc., etc., that they would take all of the remaining assets that the receivers could possibly spear out.

I told Gillies that if I was going to mention it to Young the first thing he would want to know is what about the damages and what about attorneys' fees and court costs. Gillies said, "Well, that can probably be handled."

I said, "Handled how?" He said, "Well, I haven't any idea, but we might waive it."

I said, "Well, what about court costs?" He said, "Well, let the attorneys struggle that out.' I said, "I don't know: It sounds like sense to me that you can make in mass production hardboard cheaper than we can in our little machine. Further, we have a production capacity of about 30,000 feet per day," which of course Gillies knew. We wanted more stuff to sell. I had been trying in the meantime to convince Mr. Young to put in a couple of more units. That was one time when he declined to follow my recommendation. He wouldn't do it. He said first that we didn't have the money, and, second, he wasn't building any plants in the face of undecided lawsuits.

The COURT. It sounds like good sense to me.

The WITNESS. I found that Mr. Young generally had
599 good sense, even when he disagreed with me. I was forced most of the time finally to agree with him.

So I said, "Well, all right. I have got to go to New York. If you stew up anything let me have it, r if you stew up anything you want to talk to Lutkin about you talk to Lutkin or to Young. Or if you want to see me I will get in touch with you when I get back."

He said, "All right." He didn't know; he just had an idea. He wanted to see how it struck me. I said I would talk to Young, mention the subject to him, so that if anything happened during my absence, why, Young would be informed.

That is substantially what happened at that meeting, according to my recollection.

Q. Now that is your recollection, in substance, of everything that was said?—A. Yes, sir.

Q. I assume from what you said that there was no discussion at that time of the details of the arrangement between you and Masonite?—A. There was no discussion of the details of this scheme of Gillies', which was sort of a hazy, beclouded scheme. I do believe that I again insisted that we should have a manufacturing license. I kept on all the time with Certain-teed, insisting that we were manufacturers, we had the plant, we had the raw material, we knew how to manufacture better than anybody even including Masonite, and, by golly, we were going to manufacture, and what I wanted was a manufacturing license.

Q. You used the word "Certain-teed."—A. I mean Masonite.

Q. You say you think at this time you asked for a manufacturing license?—A. I believe.

Q. Had you, prior thereto, asked for a manufacturing license?—A. Yes, sir.

600 Q. And what did Mr. Gillies say when you asked him for the manufacturing license?—A. I don't think he made any reply. I think—oh, I don't know. Every time we got to the manufacturing license we got in each other's hair, and the question came up as to how it should be operated. There were three

things involved that were discussed practically every time I mentioned manufacturing license. First, the kind of board we should be permitted to make.

Q. What was that discussion about?—A. That discussion, we were making what we called a "quarterboard." It was a doggone good commodity at that time. It started out very poorly, but by 1932 it was a good commodity. We didn't have great success in making thinner boards, harder boards, and so on and so forth, out of bagasse, and our manufacturing department told me time and time again that in order to make a good board of that kind it had to be made out of wood. Then they were making various tempered woods, or tempered boards, which didn't work out satisfactorily with bagasse. So I was after, even when Judge Nields decided that we could make this stuff out of bagasse, I was still after a manufacturing license under Masonite, because I wanted to add wood to the bagasse, and then I wanted to make straight wood products, so as to make a complete line of the thin and panel and semi-hard and hard.

And there were three things. First, Masonite, if they gave us a license at all, would they give a license to manufacture all types of board. They thought that they had a God-given right or something to manufacture what they call their—oh, their super-deluxe board. The second question came up as to what types of trade, and what types of board for what types of trade we should be permitted to make and sell.

601 Q. Tell us about that; what was the discussion?—A. That discussion was, there was a small trade at that time—a relatively small trade—of selling to manufacturers for remanufacture. Our information was that Masonite was putting in their seconds and their shorts and so forth and so on. I thought in my own mind and our boys agreed with me, that eventually that would be a very large volume, larger than to be supplied by seconds and shorts. Gillies took the position that the manufacturing trade was out. That belonged to the shorts and miscellaneous, and that was out—nothing doing on that.

Q. What was the third thing?—A. But that we could have the lumber-dealer trade and the moving-picture trade. The third thing was terms and conditions under which we should operate, including price at which we might sell, Masonite taking the position that if we were going to have a patent license, we would have to have conditions of all kinds, terms and conditions of price, and so forth, under which we could manufacture. That always went off on a tangent, on how to fix price. I was not willing to recommend to Young that we should sew ourselves up in the Masonite basket and then not be sure that we had a price under which we could operate, so I insisted, first, that we would have to have a formula, not just Masonite's statement that they were going to be good fellows, but we would have to have a definite formula that

would insure our price or the price at which they would permit us to sell to be competitive—competitive with themselves on equal board, and as far as possible competitive with other competing products, because there were many that competed in this hardboard use.

And then second, I wanted to be sure that they had in
602 mind mass production, because to my mind, if they did, that meant a price so gauged as to sell the greatest quantity in order to achieve mass production.

Those were the three items that we wrangled about when we met on license.

Q. A moment ago you said that you wanted to make sure that the price was really a competitive price. Will you explain to us what you meant by that?—A. Yes. I did not want Masonite to instruct us to sell for $32, when they were selling for $31, neither did I want Masonite to say, "Your terms were thirty days and ours were sixty days."

Q. You wanted to be sure they were selling at the same price and conditions?—A. I wanted to be sure that we could sell at as favorable a price as they were.

Q. After the meeting in 1933 between you and Mr. Gillies in your office, which you have testified, I believe, occurred shortly after the decision——A. I beg your pardon?

Q. You testified, I believe, that that meeting occurred shortly after the decision of the Circuit Court of Appeals, is that right?—A. Yes.

Q. After that first meeting, did you talk to Mr. Gillies again—after the decision of the Circuit Court of Appeals?—A. After the decision of the Circuit Court of Appeals, as I recall, the circumstances were, I came back to Chicago from New York and Munroe, I think, or Lutkin, one or the other, notified me that Masonite had submitted to Lutkin a sales agency agreement. I got in touch with Lutkin, or Lutkin got in touch with me, I forget which, to come over and talk to them about this proposal of Masonite, to settle our differences, and so forth, and so on.

Q. Whom do you mean by "they"?—A. With Mr. Lutkin and Mr. Young. Mr. Lutkin was of Young's firm and was doing the legal business for the receivers, so that when Young was in his own office, he was in the same law office as Lutkin. When he was over in the Celotex office, Young had an office next to mine.

603 Q. Did you thereafter see the proposed agency agreement which had been submitted?—A. Yes; they went over to Lutkin—I went over to Lutkin's office and I had discussed it with Young and Lutkin and brought the proposal back with me for discussion with all of the other boys in the organization.

Q. You mean brought it back to New York?—A. No; to Chicago.

Q. You brought it back from where?—A. From Lutkin's office.

Q. In Chicago?—A. In Chicago, and to my office in Chicago.

Q. And you talked it over with certain persons there, is that correct?—A. Yes.

Q. Who were those persons?—A. Mr. Muench, who was in charge of operations, Mr. Munroe, who was in charge of research, Mr. Hampson, who was looking after patent affairs, and Parsons, who is in charge of the mill at Marrero, and I think I talked it over with our advertising man—generally with the organization.

Q. After you had received and read this proposed agency agreement, did you see Mr. Gillies again?—A. Until what time?

Q. At any time prior to October 10, 1933?—A. I don't remember. I doubt it. At least there wasn't any meeting that impressed itself on my mind. I don't think so.

Q. Was that proposed agreement which was submitted to you by Mr. Gillies the identical agreement which was subsequently executed on October 10, 1933—I mean from Gillies to Lutkin to Dahlberg?—A. No; I think there were some changes made. I know our boys found all sorts of fault with it, and made a lot of suggestions, and if I recall rightly, Young told me to put all of those in writing, which, according to my recollection, I did. I wrote Masonite and furnished a copy to Young and to
604 Lutkin, who were then conducting the negotiations with Masonite, particularly Lutkin.

Mr. Cox. Will you mark this for identification?

(Marked "Government's Exhibit 23" for identification.)

Q. I hand you a document consisting of eight pages, which purports to be a photostatic copy of a letter addressed by you to Mr. Gillies and dated September 20, 1933, and will ask you whether, in fact, you wrote that letter?—A. It is unsigned, but I believe that is the letter; yes, sir.

Q. Is that the written comments on the proposed agreement which you were referring to a moment ago?—A. Yes, sir.

Q. And did you send that to Mr. Gillies?—A. Yes, sir.

Mr. Cox. I offer Government's Exhibit 23 for identification in evidence.

(Government's Exhibit 23 for identification received in evidence.)

Q. Do you know whether at any time in September 1933 or October 1933 Mr. Lutkin ever met Mr. Gillies when you were not present? I am just asking you now if you know?—A. I don't know whether I know or not, because Lutkin, during that period, as I say, was conducting the negotiations principally with the Masonite lawyers on these agreements, and he reported to me conversations with Masonite, whether Gillies was there at the time or not, and I guess my answer will have to be I don't know.

Q. You don't know?—A. No; I would believe that he did, but I don't know.

605 Q. Now, at any time in any conversation you had with Mr. Gillies in 1932 or 1933, do you recall whether you ever asked him if Masonite would sell hardboard to Celotex?—A. In 1932?

Q. Yes; or 1933?—A. I recall 1932 or 1931 that I asked the Masonite Company to sell us hardboard on a cost-plus basis or something of that kind. I recall Mr. Alexander was there at the time and he turned to me and he said, "What do you think I am, a sap?" and that ended that discussion.

Q. Do you recall whether at any time between the 1st of August 1933, up to and including the 10th day of October 1933, in any of your conversations with Mr. Gillies the names of any companies except The Celotex Company and Masonite were mentioned?—A. What is your question; do I recall?

Q. Whether the names of any other companies were mentioned?—A. They were not mentioned.

Q. They were not mentioned?—A. No, sir.

Q. Did Mr. Gillies ever say anything to you about executing a similar agency agreement with any other company?—A. No, sir; and to the contrary, I believed from his representation it was going to be a deal between Celotex and Masonite.

Q. That is, you believed at that time that no one else was to get an agency contract of this kind?—A. Yes, sir.

Q. Is that right?—A. Yes, sir.

Q. When did you first find out that other people were going to get contracts of that kind, if you recall?—A. I think it was almost immediately after Young executed this contract.

Q. How long did you continue to manufacture hardboard in 1933, and by you I mean the company as operating?—A. Oh, I don't recall; I think we had a period there to make deliveries

606 of board we had contracted to sell and get rid of our seconds and our shorts, fill some export contracts that we had. I don't know. A few weeks, I would say.

Q. A few weeks after October 10, 1933?—A. I would say a few weeks or perhaps two months, three months; just a short relative period.

Q. And would that time have been as long as the 1st of January 1934, do you think, Mr. Dahlberg?—A. Oh, yes. Now, whether we manufactured up to that time or just shipped, I would have to consult the records; I don't know.

Q. Well, do you recall now when you stopped manufacturing?—A. No.

Q. More precisely?—A. No.

Q. But at some date within a short period after October 10, 1933, you did stop manufacturing; is that correct?—A. Yes, sir.

Q. Have you at any time since manufactured any hardboard or any hardboard panel board?—A. We have manufactured—

well, it all depends on what you call manufacture. We have made all kinds and types in an experimental way.

Q. Have you sold any of those?—A. No, sir.

Q. Not sold any?—A. Wait a minute. In England, we have.

Q. Sold directly by your company or by an English subsidiary?—A. Well, that is by a wholly-owned subsidiary in England.

Q. And it manufactures hardboard and sells it there?—A. Yes, sir.

Q. Does it sell anywheres else?—A. Yes; it sells all over the world; it sells all foreign markets.

Q. Does it sell in the United States?—A. No.

Q. Do you know, by the way, as a matter of interest, Mr. Dahlberg, what kind of a process your company uses to manufacture hardboard in England?—A. In England?

607 Q. Yes.—A. We use the same process, with some changes, that we used at Marrero.

Q. Prior to 1932?—A. Prior to—whenever we quit.

Q. 1933; yes.—A. The machinery which we had at Marrero was sent over to England and installed. We do not use the explosion type, nor do we use very largely the cooking type that we had down at Marrero, but we use a grinding type, but it just makes a better board, less seconds, so on and so forth. An outsider coming in and just looking at the operations would say, well, it is about the same.

Q. What material do you use to make it?—A. We use wood and bagasse, I would say about 50-50 of each.

Q. You mean it is a kind of a mix that you use?—A. Yes, sir.

Q. Of wood and of bagasse?—A. Yes.

Mr. TUTTLE. This is England you are talking about?

The WITNESS. Yes; England. That is what I wanted to do in the United States, but Masonite would not let me.

Q. Now, Mr. Dahlberg, do you recall talking to Mr. Wallace at any time in 1936, Mr. Wallace, of the Masonite Company?—A. I guess I did. I can't imagine a year going by and not talking to Wallace.

Q. Calling your attention again to the stipulation and to the statements in paragraph 41 and paragraph 42 which refer to certain agreements which were entered into on October 29, 1936, I ask you whether——A. What is the page, please?

Q. That is on page 24, Mr. Dahlberg.—A. What was the question?

Q. I was about to ask you whether you recall talking to
608 Mr. Wallace at any time in 1935 or 1936 about the execution of these agreements?—A. Well, I can't recall specifically. I think, I am quite sure, that Mr. Wallace stated to me that there were a lot of misinterpretations about the 1933 agreement and a lot of abuses had grown up with reference to pooling of ship-

ments and pooled cars and mixed car shipments and territorial descriptions; that some of the agents seemed to be operating at tangents from the other agents, and he wanted a uniform contract, and asked if I had any objection to putting down a minute contract so that there would be no necessity for interpretations or squabbles, put down in detail what the 1933 agreement meant.

I told him that could be easily accomplished by amendments. I had no objection to putting in any words as to what the contract meant or was supposed to mean and that he could take that up or have Mr. Lewis, whom he said he had working on the matter, take it up with Mr. Hurd. Mr. Hurd was Mr. Dallstream's partner, who was our attorney at the time, Mr. Dallstream being, I think, in South America.

The next thing I knew about it, why, there is submitted to me for review a brand new contract.

Q. A printed contract, do you recall?—A. As I recall it, printed in galley form.

Q. Do you recall now whether prior to October 29, 1936, you knew that Masonite had an agency agreement with the companies listed in Paragraph 41 of the stipulation?—A. 1936?

Q. Prior to October 29, 1936?—A. Oh, yes.

Q. You knew that?—A. Yes, sir.

Q. At that time?—A. Yes, sir.

Q. And I assume from your previous answer that you knew prior to October 29, 1936, that the new contract was to be executed with these other companies also, is that correct?—A. Well, I assume that, of course.

609 Q. Now you spoke a moment ago of certain abuses which had grown up in the industry with respect to mixed cars. Do you recall that?—A. Yes.

What were those abuses? Did you know anything about them?—A. Well, I can't tell you definitely because I was not following the details of that. But I do know that up in New England there was quite a squabble with some of our own folks. Masonite objected to one of our customers buying a mixed car half insulation and half hardboard and then redistributing that hardboard in lesser quantities which had the effect of actually breaking the price. That was one thing. That wasn't specifically spelled out in the original contract. As I looked at it, the original contract covered it, but not in so many words. That was one thing.

Then there came up the question of who was a wholesaler and who was a retailer. That was the source of controversy between ourselves and Masonite.

Q. You are speaking of who was a wholesaler and who was a retailer for the purposes of the distribution of hardboard, aren't you?—A. Yes, sir.

Q. Not anything else?—A. Not anything else.

Q. What was that controversy?—A. The controversy was this: under the hardboard plan, there was a price to dealers. Then there was a lesser price to wholesalers. Now the question was, who was a wholesaler?—A. A big dealer would say, "I buy more than a small wholesaler, so I am a wholesaler. In fact sell some of my goods wholesale, so that makes me a wholesaler."

On that basis, why, everybody who was an important fellow, claimed to be a wholesaler. That was a very, very controversial point between us.

Q. You mean the controversy was over who would determine who was a wholesaler?—A. Yes. Masonite took the
610 position and I thought rightly, under the contract, that they should determine what class—not the individual—but what class. A description of a wholesaler, if you please. If Jones fell within that description he was a wholesaler. If Smith did not, why, Smith was not. And it was very difficult to make a definition. That was one thing.

So that over a period of years I was conscious of the fact that there were conflicts that required rulings from Masonite.

Q. Now a moment ago you spoke of certain abuses that you said existed with respect to pooled cars. Do you recall that statement you made a moment ago?—A. Yes.

Q. What were those abuses, do you recall now?—A. Well, that is the same thing, except they would buy a whole carload of hardboard and then distribute it among themselves or stock in transit.

Q. By the same thing, you mean, it is the same instance as the mixed car lot?—A. That is right, except one was—that is right.

The Court. I guess we had better stop there and adjourn to two-fifteen.

(Recess until 2:15 p. m.)

AFTERNOON SESSION

Bror G. Dahlberg, resumed the stand.

Direct Examination by Mr. Cox (Continued):

Q. Mr. Dahlberg before lunch you testified that in 1932 the Celotex Company was selling hardboard for use in the
611 motion picture industry, do you recall that testimony?—A. Yes, sir.

Q. Are you selling any hardboard now for use in the motion picture industry?—A. Yes, sir.

Q. In 1932, were you selling any hardboard for industrial use as distinguished from use in the building industry?—A. No, sir.

Q. No use of that kind?—A. Not that I know of.

Q. You testified, I believe, before lunch, that that was one of the things you discussed with Mr Gillies from time to time, is that correct?—A. Yes, sir.

Q. Have you at any time since 1932 up to and including the present day, sold any hardboard for industrial uses as distinguished from use in the building field?—A. Not that I know of.

Q. I think when we adjourned, you had been testifying about negotiations which preceded the 1936 contract. What do you understand the term "combined bids" to mean in the industry?—A. A combined bid, as I understand it, and as we use it in the sales department, means this: a quotation comes in for a bid on say so much hardboard, for example X piece of hardboard and X piece of wall board. A combined bid is where you bid a lump sum for those two, without itemizing. A divided bid would be one in which you would bid so much for the hardboard and so much for the wall board.

Q. You testified, preceding the October 29, 1936 conversations in your discussions with representatives of the Masonite Company, there were references to abuses which existed in the industry, do you recall that?—A. Yes.

Q. In any of those conversations was there any reference by you or anybody in your presence as to a combined bid?—A. I am sure there was.

Q. Do you recall now the substance of what was said with respect to combined bids?—A. That the use of combined
612 bids could be used as a device to cut the price of hardboard. At that time the price of hardboard was fixed under the terms of this del credere agreement. Under that, we as an agent would have to bid $33, for instance, on hardboard, if that was the price. Now, if we were also selling soft board or any of the other types of board, pulp board, and our regular price on that was $25, by making a combined bid the two would be $60—just for easy figuring, and we could make a combined bid of $50 and claim to Masonite that we were charging $35, the regular price on hardboard and were cutting the price actually on soft board, when as a matter of fact we were not doing that at all. That is the abuse that this combined bid illustrates.

Q. That situation was discussed prior to October 29, 1936, in these conversations, was it?—A. I am quite sure it was.

Q. Mr. Dahlberg, do you recall whether a copy of a price agreement was submitted to you by Masonite at any time in 1936 prior to October 29th?—A. My recollection of that agreement, as I stated this morning, was, I suggested to Masonite to discuss the matter with Mr. Hurd, and that I had no objection, so far as our company was concerned, to spelling out any difference. As for instance, we had a difference with Masonite as to how to figure percentages for us, whether we should use the wholesaler's

price or the retailer's price. That controversy got to be quite bitter and we finally submitted it to arbitration. The arbitrators finally decided—I think they decided about half and half for each side. That was one thing that was suggested to be covered specifically in this amendment or the rewriting of the agreement—the amendment. When it next came to me, it was in a new memorandum rather than as an amendment, Mr. Hurd stating that in substance, the same arrangements were
613 carried out only spelled out a little further and in a little more detail.

Q. Do you recall now whether you made any suggestions as to the form or substance of the first contract that was submitted to you?—A. About all I can say is that I would be surprised if I had not made some suggestions because I was quite familiar with all our details and one thing and another, perhaps more familiar even than Mr. Hurd, but whatever suggestions were made, either were incorporated or disposed of in some way. I don't recall specifically, but I must have.

Q. In these conversations which you carried on prior to October 29, 1936, do you recall now whether there was any reference to the price at which Masonite would sell under the new agreement?—A. I am quite sure there was not.

Q. You think there was not?—A. There was not.

Q. That was a matter which you said nothing about?—A. No; I talked only about a formula, just a formula.

Q. I see.—A. Not price.

Q. Well, what was the formula to be?—A. Well, the formula that was finally worked out was that we would sell at the same price that Masonite sold. In other words, Masonite would give us permission to sell and charge no more than they themselves charged. They finally, to my mind, worked out a formula that would keep us competitive, and in addition thereto I had finally been convinced that Masonite wanted mass production, so I figured that formula would insure protection against Masonite and protection against other competitive materials.

Q. And there were discussions of that formula, as you called it, prior to the execution of the 1936 agreements?—A. 1936?

Q. Yes.—A. Well, I can't say there were, because that was the formula in the 1933 agreement.

614 Q. Was it your understanding in 1936 that that formula would be continued?—A. Definitely.

Q. Mr. Dahlberg, what is Oswego board, do you know?—A. Oswego board is or was an insulation board made up in Oswego, New York, by, I think, the Oswego Paper Company.

Q. Did the Celotex Company ever make Oswego board?—A. No.

Q. Do you recall whether in these conversations, prior to Oc-

tober 29, 1936, you made any reference to Oswego board?—A. Oswego board?

Q. Yes.—A. I don't believe I ever did.

Q. Do you recall anyone else saying anything to you about Oswego board?—A. No, sir.

Q. Now, Mr. Dahlberg, I call your attention to paragraphs 50 and 51 of the stipulation, which appear upon pages 27 and 28 of that document?—A. Yes, sir.

Q. And which refer to the execution of certain agreements which are dated as of March 20, 1941.—A. Yes, sir.

Q. Did you have any conversation with any representative of Masonite Corporation in January or February or March of this year with respect to the distribution of hardboard?—A. I don't believe I did.

Q. Do you recall whether a copy of a proposed agreement was ever submitted to you for your examination in February or March of 1941?—A. Well, in March it might have been, but in February, no.

Q. Now, do you recall whether it was in March?—A. Well, Mr. Dallstream submitted to me an agreement that he was working on with Masonite, stating that he was following out my suggestion made to him, which was about as follows: When the complaint of the Government against Celotex was made, I asked Mr.
615 Dallstream just what it was that the Government was complaining about, that it seemed to me that we wer agents, we had lived up to the contracts, they looked all right to me; we were selling, as I called it, "on the nose," and just what was the trouble.

Then he said, well, there were various provisions in them that there had been some discussion about whether a del credere agency was a true agency. I said, well, I don't know anything about agencies, but if there is anything in here that would mislead anybody as to just what we are doing, for goodness sakes get together with Masonite and correct all those or anything, put down on paper just what we have been doing and what we want to continue doing.

So he reported to me that he and the Masonite lawyers, and I know three or four other lawyers, got together and either advised this, and Mr. Dallstream finally called me down to New York just before the signing of this, showed me a draft galley proof, I made one or two suggestions, just minor suggestions, as I recall it, and told Mr. Dallstream that so far as I was concerned, I would discuss it with my board of directors, I was sure that they would agree to the signing of these agreements so as to clarify the situation. I did discuss it with my board, they agreed, and we authorized Mr. Dallstream to go ahead.

Q. Now, did you ever talk to anyone else about the agreement

except Mr. Dallstream and your board of directors?—A. Only at this meeting of lawyers. I talked direct to Mr. Dallstream. I don't know. As I recall, Mr. Alexander was there. I did not discuss anything with him, because Mr. Dallstream was handling all the negotiations, but I certainly said, "Hello," to Mr. Alexander.

Q. Do you now recall whether at any time between October 10, 1933, and he 1st of April of this year you ever asked any representative of Masonite to eliminate from the agreement those provisions which required you to sell at the same price as Masonite sold?—A. No.

616 Q. You never made that suggestion?—A, No.

Mr. DALLSTREAM. May I have that question and answer read?

(Question and answer read by reporter.)

Q. You testified this morning that some time in 1932 you thought, I believe, that you had asked Mr. Alexander if the Masonite Company would sell hardboard to you. Do you remember that testimony?—A. Yes, sir.

Q. Did you ever make that same request later?—A. No, sir.

Q. Never made it again?—A. No, sir.

Q. Do you recall whether, in the conversations which took place in February or March of this year, you ever said anything about the prices at which Masonite would sell hardboard under the new agreement?—A. No, sir.

Q. Did anybody say anything to you about that, and I am not including Mr. Dallstream in that question; I don't want to know anything he said to you; did anyone——A. No, sir; nobody did.

Q. Were you in the court room on Wednesday morning this week, Mr. Dahlberg?—A. Yes, sir.

Q. Did you hear Mr. Tuttle's opening statement?—A. Yes, sir.

Q. I hope you will attend me while I read to you a sentence which appears in the transcript of that opening statement on page 30 of the printed copy, I think it appears on folio 43 or page 43 of the typewritten copy. Mr. Tuttle had previously referred to the agreements which were executed in 1933. He then said:

"It was not exclusive. We could have entered into such relations with anybody. We could do the same things ourselves."

617 And I call your attention particularly to this next sentence of Mr. Tuttle's:

"It was simply a provision that we would be fair to them, in other words, we would sell at the same price as our agents sold, and they would be fair to us by selling at the same price that we sold it."

I call your attention particularly to the words "We would sell

at the same price as our agents sold," and ask you whether, in 1936, prior to the execution of the agreements which were signed in that year, you understood that that was the policy of the Masonite Corporation?

Mr. DALLSTREAM. I object to that, your Honor. The instruments that were finally entered into speak for themselves.

The COURT. Objection sustained.

Q. I now ask you, Mr. Dahlberg, whether you understood that that was the policy of the Masonite Corporation prior to the execution of the agreements which are dated as of March 20, 1941?

Mr. DALLSTREAM. I make the same objection, if it please the Court.

The COURT. Same ruling.

Q. Mr. Dahlberg, at any time between 1934 and the present time have you received any hardboard from Masonite Corporation, in addition to the hardboard which they have shipped to you as a del credere agent?—A. I can't answer that. I can say that we have received hardboard from Masonite for sale in foreign countries that did not come under this del credere agency. I think we had an arrangement to sell in some foreign
618 countries hardboard, but in the United States we received nothing outside of that agreement.

Q. Do you know whether the quantity of hardboard which you received for sale in other countries at any time was substantial?—A. No.

Q. Does your company maintain warehouses in any parts of the country?—A. We maintain warehouses at Newark, New York, Metuchen, New Jersey, St. Louis, Missouri, Chicago, Illinois, and at Los Angeles, California, and of course Marrero.

Q. At these warehouses do you store any hardboard?—A. Yes, in small quantities.

Q. Considering all of the warehouses collectively, are you in a position to give me any estimate as to how much hardboard, in terms of footage, you have in those at any one time?—A. Outside of Marrero I would say—oh, probably half a million feet tops.

Q. At one time?—A. Yes. Probably not that, but that is tops.

Q. That would be a top figure?—A. I think so.

Q. Now will you give us some bottom figure that would indicate the range?—A. I would say probably 100,000 feet.

Q. Is anything besides hardboard kept in these warehouses?—A. Yes; all of our products.

Q. In a normal case, the usual case, how long would hardboard remain in a warehouse? Can you give us any estimate on that?—A. At Marrero the movement is in and out constantly. The turnover would be I imagine once a month. At the other places we kept them only for emergency stocks. A fellow wanted some stuff immediately, so that we had no regular turnover on those. There

might be a turnover once a month, and it might be once in six months. It was strictly emergency stocks.

Q. And do you know whether prior to the 1st day of April of this year in any of those warehouses there were
619 any signs or notices stating that the hardboard was the property of Masonite?—A. I don't.

Q. You don't know?—A. No, sir.

Q. Do you advertise your hardboard product—A. Yes, sir.

Q. How is that advertised?—A. We call it in our advertisements, Celotex Hardboard.

Mr. DALLSTREAM. I should like to object to that line of examination. It is all covered by the stipulation and furthermore, I should like to object to the form of the question as not being in line with the realities, indicating that it might have been referring to Celotex hard board.

Mr. COX. I accept that correction. You understood I meant Masonite hardboard, did you not?

The WITNESS. No; I assumed it was the hardboard we were handling.

By Mr. DALLSTREAM:

Q. That you got from Masonite?—A. Yes, sir.

Mr. DALLSTREAM. May I ask what time you are relating this to?

Mr. COX. This question relates to the period of time prior to the 1st day of April 1941.

The WITNESS. I think, to the best of my recollection, we did that from the beginning.

Mr. COX. I think I have finished.

Cross-examination by Mr. DALLSTREAM:

Q. Mr. Dahlberg, on what date did you begin manufacturing hardboard in England?—A. In England, in 1938.

620 Q. Was that the year that the English plant was completed?—A. Yes, sir.

Q. And do you manufacture in the plant also structural insulation boards?—A. We do.

Q. Will you tell us what were the reasons which motivated the Celotex Corporation in establishing this plant in England?—A. One of the main reasons was—there were two reasons: first, we wanted to service Europe, which we could do better by manufacturing in Europe. Second, so far as hardboard was concerned, I was determined to get into the hardboard business in Europe, because that was the big part of the business, as I saw it, rather than soft board, and in England, Masonite did not have any hardboard patents, so we could manufacture it there unmolested by Masonite.

Q. And what markets do you serve out of that English plant on hardboard?—A. At the present time, of course, we serve

England and practically nothing else. Prior to the war, we served the British Empire and the Continent of Europe.

Q. Do you still take any hardboard from Masonite for the purpose of serving any foreign trade?—A. We do.

Q. And is that divided into territories or do you alternate between their board and the English-made board?—A. Well, at the present time, as I say, the English Government has taken our entire output for military purposes. Before that, it depended upon freight rates, duties, rates of exchange, the currency exchange, and then the capacity of the English plant. In other words, we use Masonite only to fill those orders which could not be better filled from England.

Q. Your practice, I take it, was largely prompted by which you could make the most money?—A. That is correct.

Q. Mr. Dahlberg, in any conversations that you might have had with the officials of Masonite prior to this meeting at your office, after Judge Nields' decision in 1932, did you ever discuss any arrangement with Masonite of any kind or character other than a manufacturing license?—A. In 1931 I still had the same difficulties I had this morning. In 1931, I remember distinctly, a conversation with Mr. Alexander and some others of Masonite, that is, after they had filed the suit. In 1932 I had a conversation after Judge Nields had given his decision. At one of those conferences, and I am inclined to believe it was in 1932—I am not sure—but at one of those conferences I made the suggestion to Alexander that since he wanted to manufacture and wanted mass production, he could get it by selling us on a cost plus basis—cost plus 10 per cent, something like that. He returned the answer that I indicated this morning. After that answer, and placing myself in his position, I did not make that suggestion to him again, because I figured the answer would be even more vehement than that.

621

Q. Following that one suggestion, from that time, whenever it occurred, up to the meeting which you had with Mr. Gillies, after the Circuit Court of Appeals had reversed this decision of the District Court of Delaware, did you ever seek any kind of arrangement with the Masonite Corporation other than a manufacturing license?—A. No, sir.

Q. And during that period, what were the desires of the Celotex Company, first, up to the time of the receivership and from that time on the desires of the receivers, with reference to the sort of arrangement you sought with Masonite?—A. We wanted a license to manufacture all during that period. That covered the old board of directors; it covered the old management; it covered myself working for the receivers; it covered the receivers up to the time when Mr. Young had to decide whether he was going to gamble or not, and it was my desire even after that time, I felt so

622 strongly about it that in one way or another, I succeeded in getting Young to delay signing the agreement about a month after he had concluded to do it, hoping we could develop something in the way of manufacture or something would happen, because I was not personally in favor of this cussed del credere business.

Q. Now at this first conference which you had with Mr. Young, the receiver, and Mr. Lutkin, his counsel, following your return from New York, and your being advised during your absence that Masonite had forwarded this first draft of this proposed agency agreement to the receiver, what views did you express to the receiver and his counsel as to whether or not that agreement should be entered into?—A. I told Mr. Young that I was opposed in principle to that; that I had been trying for a long number of years and by the expenditure of a great deal of energy, trying to build up manufacture and distribution business in the material building business; that we had the plant, we had the facilities, we had the raw material, and we should use those and we should not become simply a peddler of other people's goods. I hoped he would not agree to that unless it became absolutely necessary in his opinion as a lawyer, and as receiver.

He pointed out, as I think I stated this morning, that his position as receiver might be entirely different from my position as an operator; that as an operator I was building and as a receiver he was conserving, and as I say, right up to the last twenty-four hours, I think I kept on resisting this agreement, hoping in some way or other either to find out how to make it ourselves or that at least hoping that Masonite would give us a manufacturing license.

Q. What, if anything, did the organization that was being handled by the receivers during that period, from the latter part of August of 1933, up until the actual date of signing
623 this agency agreement on October 10, 1933, do with reference to efforts to find a way to manufacture outside the scope of the Masonite patents as interpreted by the Circuit Court of Appeals decision?—A. From the time of the Circuit Court of Appeals right up to the signing of this agreement everybody practically in the operating department, except the regular operators, and in the research department devoted all their time and attention in a frantic, mad scramble to get something that would clear us of this decision and permit us to continue the manufacture of hard board. They tried various ways. I, myself, spent days consulting outside patent counsel. I got so I was disgusted with Huxley. I was disgusted with Young as a lawyer. I went to New York and consulted different lawyers in New York; Darby, for instance, and some of his people, and went to Washington. I just could get no comfort out of anybody.

We tried rice straw. We tried cooking. We tried the idea of introducing some different kind of glue or adhesive to substitute for the natural lignins in the wood, and we just couldn't get anywhere. We just couldn't get anything that would work out commercially, or that they would agree with me would clear us of the patents. And Mr. Young's instructions to me were clearly, "Do anything you want to; we are not going to get into another lawsuit on those patents, and we are not going to take a chance on an adverse decision that would make us pay a lot of damages," and I went just that far.

Q. What were the provisions of the 1933 agreement with reference to the tying up of the receivers with the continuation of this arrangement in the event that they should find some way to circumvent the Masonite patents?

Mr. Cox. I will object to that. It is part of the agreement. It is in the agreement, if it is a part of the agreement.

624 The COURT. I didn't hear the question.

Mr. DALLSTREAM. I will withdraw that question.

Q. Did you have any discussions with the receivers or their counsel, or with anyone else during the negotiation stage of this 1933 agreement, as to the term of the agreement and as to the rights of cancellation?—A. I did.

Q. And if so, what was said?—A. Had discussion with Mr. Young and Mr. Lutkin, both, particularly Mr. Young. The agreement as originally presented covered the life of the patent. I told Mr. Young very definitely that if he signed that agreement in that way that I didn't know what would happen, but I would have to do something terrible; I just couldn't work for him any more, and so forth and so forth, because in my judgment this was tying us up for 14, 16 years, so we couldn't wiggle. I finally said I strongly urge on him not to sign it, regardless of consequences, unless we had a short cancellation clause. I suggested three months, and he finally suggested, "Well, that is a little short. We ourselves need more than three months." So we had a six months' cancellation clause. In other words, it bound Masonite to leave us free to get out any time we wanted, on six months' notice.

The COURT. What was the cancellation in the original agreement? Was it six months?

Mr. DALLSTREAM. The agreement provides now, as finally executed, for cancellation by the agent Celotex upon six months' notice.

The COURT. You say it was finally executed when? In 1933?

Mr. DALLSTREAM. In 1933; yes.

Q. And has that same cancellation arrangement been preserved throughout the changes and amendments from time to time?—A. Yes, sir.

625 Q. And do you still have a six-months' cancellation right?—A. Yes, sir.

Q. Mr. Dahlberg, had your research department and your patent counsel been able up to the time of the execution of the October 10, 1933, agreements worked out any method by which you could manufacture, without infringing Masonite patents, a hardboard panel board or a product which could compete with the hardboard products which you had been accustomed to sell?—A. Not as interpreted by the Circuit Court of Appeals.

Q. And at the time that the October 10, 1933, agreement was actually signed, how many days of grace remained before in connection with your petition for certiorari a decision would have been rendered?—A. Well; as I recall it, the next day the world was going to blow up.

Q. And you disposed of it the day before the decision would come down?—A. That is my understanding; yes, sir.

Q. Now following the execution of the October 10, 1933, agreements, and the starting of operations under those agreements, did you stop the research work and the development work on so-called hardboard products?—A. We did not.

Q. Will you sketch very briefly the efforts which had been made by the receivers from the date of the October 10, 1933, agreement, up until their discharge, by the trustees in bankruptcy from the date of their appointment up until their discharge in 1935, and by the Celotex Corporation itself since that date, and down to the present time, with reference to research and experimental work, in any efforts that were made to produce a hardboard product which could be manufactured and sold by the organization?—A. Ever since that time, almost continuously, with varying degrees of energy, depending upon what other things seemed at the moment pressing, we have never stopped trying to find out
626 how to make a hardboard—how to make hardboard outside of the Masonite patents. We found out how to make a board that was hard. I want to distinguish between hardboard and a board that is hard. We are making board that is hard. It is not hardboard. It hasn't got the qualities, and so on and so forth. We have spent—I don't believe there has been a month that we haven't had one or more people continuously on that job. I have employed—or the company has, the corporation has employed—outside chemists, outside engineers to help out. We spent a great deal of time, a great deal of research. We have been able to make a board that is semihard. We have not been able to make hardboard; that is, a board that had the properties of the Masonite hardboard, without in some way running against the Masonite patents. On two or three different occasions I have been convinced personally that we had it solved. I even, I think, notified Masonite that I was about to ask our board to notify them of

the cancellation of our contract. We had at that time a lawyer on the board by the name of Seymour. He said, "Well, there is only one patent counsel whose word I would go on against that, and that is Darby. What does Darby say?"

Well, Huxley had passed it. He said he thought it was all right. Our own fellows had passed it. I went down to see Darby. Darby said, "I would go ahead with it. What is it going to cost?" "Well, it is going to cost about a million dollars."

He says, "I wouldn't go ahead with it for a million dollars if I were you. If you can spend eight or ten or fifteen thousand dollars, why, that is a good gamble, but if you are talking of an impressive sum like that you better leave it alone."

I reported that to my board, and they just stepped on me and my grand scheme for making hardboard. In other words,
627 we have done, the organization and myself, everything that we could think of, and everything that anybody could think of that we could hire. So we have not been happy under this del credere agency agreement at all.

Q. Have the efforts in this regard to develop a hardboard product which you could manufacture in your plant and sell been discontinued at any time?—A. Right now, or we have, a man, an outside engineer, whose main duty is to run down and work on another idea. I don't know where he is going to get on it, but it looks as if he might have a lead. Our own engineers say that it is impractical. I think it is practical, myself, just on the theory that anything can be done if it is worked at long enough. But we haven't solved it yet, and this engineer has not rendered a final report.

Q. As the chief executive of the Celotex Corporation, do you intend to continue these efforts?—A. I do.

Q. Mr. Dahlberg, was your acquiescence in the decision of the receiver to enter into this October 10, 1933, agreement, in any manner motivated by a desire to enter into any agreement or arrangement which would provide for the fixing of controlled prices?—A. No, sir; no, sir. All I wanted was board.

Q. Did you ever ask the Masonite Corporation or any of its representatives or any of those other companies who later became del credere agents, or any of their representatives, to enter into any agreement with you or anyone else for the purpose of fixing and controlling prices on hardboard?—A. No, sir.

Q. Did you give your acquiescence or approval to the execution of the 1933 agreements in any hope or expectation that the same or similar agreements would be entered into with any other company or person or corporation by Masonite?—A. I did not.

628 Mr. Cox. May I have that question and answer read?

(Question and answer read by the reporter.)

Q. Did you contemplate or expect, at the time that the receivers

entered into this 1933 agreement, that Masonite would enter into similar or identical agreements with any other person, firm, or corporation?—A. No.

Q. Did any of the corporations who later became del credere agents ever discuss with you or, to your knowledge, with the receivers or the representatives of the receivers, the idea of any such agreement of this sort, prior to October 10, 1933?—A. No, sir.

Q. Have you ever had any conferences with the Masonite Corporation or any of its representatives or with any of these del credere agents, or any of their representatives, at any time, with reference to the fixing or determining of the prices which Masonite would use under the terms of this 1933 agreement or the 1936 agreement or the 1941 agreement?—A. No, sir.

Q. Did Masonite ever ask your views or help or advice with reference to what would be a proper price for them to fix?—A. They never did.

Q. Did Masonite indicate to you at the time of the execution of the 1933 agreement or at any time prior thereto that the effectiveness of that agreement and the continuance of that agreement should be dependent upon their ever making any other deals with anyone else along the same or similar lines?—A. I would like to answer that question, but I would like to point out, Mr. Dallstream, that that agreement was executed for the receivers and by the receivers. I was not present at the execution. I can only report what was stated to me. First, no representation of that kind was made to me by anybody on behalf of Masonite. Mr.
629 Young told me no representation of that kind had been made to him by anybody on behalf of Masonite. And that came up particularly when I stirred up or tried to stir up with Mr. Young quite a fuss because we had not had an exclusive arrangement at least for the time being.

Q. What was said about that exclusive arrangement, and how was that question finally determined?—A. Well, the exclusive arrangement Mr. Young finally determined by saying that that is the best he could do and that is what he had taken, and that in any event, as he put it, there was a "favored nations" clause in the contract, so that if at any later date any more favorable contract was made by Masonite with anybody else, we would have the benefit of it, and as a lawyer he thought that protected us.

Q. In your letter commenting on this agreement you made a demand for a favored nation clause?—A. Yes, sir.

Q. Who was the author of that idea, Mr. Young or you?—A. I was.

Q. And I take it the first draft did not have such a clause?—A. Yes, sir.

Q. I say I take it the first draft did not have such a clause?—A. It did not; no.

Q. Mr. Dahlberg, it is true, is it not, that both Mr. Colin C. Bell, of Wilmington, Delaware, and Mr. Hobart Young have died since these events took place?—A. Yes, sir.

Q. In compliance with the provisions of the favored nations clause, you have been regularly furnished, so far as you know, with copies of every agreement of any similar character which Masonite has entered into with anyone else?—A. Yes, sir.

Q. And has that favored nations clause ever resulted in any discussions or controversies as to whether you were entitled to the benefit of other provisions?—A. Yes, sir.

Q. Mr. Dahlberg, at the time of the execution of the 1936
630 agreement and at the time of the 1941 agreement, did you at either or both times have any desire to enter into or continue an arrangement which would fix or control prices in the hardboard field?—A. I had a desire to do it because that was the only way that I could figure out how we could get hardboard. If you mean was that our preference or did I like it, or did the receivers like it, we did not. We did not want to have Masonite sit down and tell us how to run our business. We thought we knew how to do that better than they did.

Q. Does the agreement which has been from time to time in vogue, the 1933 agreement, the 1936 agreement, and the 1941 agreement, represent, in your opinion, the best arrangement that you were able to negotiate with Masonite?—A. Yes, sir.

Q. Mr. Dahlberg, I wish you would as briefly as possible for the record in this case, relate what, if any, advantages there are to the Celotex Corporation in being able to have a source for securing hardboard which may be distributed to the customers of the Celotex Corporation?—A. The advantages are these——

Mr. Cox. Before he answers the question, I think for the sake of the record I had better object on the ground of relevancy.

The Court. I will let him testify.

A. We are a manufacturer and a seller. In order to do a good selling job, you have to have for sale that which the buyer needs and wants. When we were only able to go out and offer insulation board, we had a very narrow margin. At that time we were the only people offering insulation board in general sale, so we had a
specialty that we could go in with and wave our hands and
631 get customers. That type of selling, however, was very expensive. So gradually, as other people began to make insulation board, we began to meet competition with such concerns as the United States Gypsum Company and other companies of that kind.

Our traveler, talking with a Mrs. Jones, could sell her $150 worth of insulation or $200 worth, to go in the house. Their traveler could sell $400 or $500 or $600 of their materials to go in the house. That left us at a disadvantage. That, sooner or later,

would overcome us. It was necessary, therefore, as I saw it, from a merchandising angle, to have a full line, and in the building-material business in 1929, 1930, 1931, and 1932 and 1933, and much more now, a full line is not a full line unless it includes this hardboard as well as insulation board, plaster board, beaver board, and the rest of the stuff. We were at a competitive disadvantage with Masonite when we could go to a soft-board dealer who wanted soft board and also hardboard. We could only sell him soft board. He would have to rely on Masonite to sell him hardboard.

Masonite operated under a selected dealers' distribution. They would go into a town, pick a dealer, and that was their dealer. They naturally would pick the dealer who would buy and sell their goods. That left our dealer out. So our dealer, and we had a great deal of experience in this, became dissatisfied with our service, threatened to quit us, and did quit us in many instances.

So I concluded, and our sales departments concluded, that in order to maintain our growth in the sale of soft board and other materials, it was quite necessary that we have hardboard.

Q. You mean soft board.—A. I mean soft board. Otherwise I could visualize and they could visualize that actually Masonite would just eat us up. So it seemed to us necessary
632 and it still seems to us necessary, that we have this line, because it goes with the distribution channel. It is just like if you want to be in the gypsum business, you must handle gypsum boards as well as gypsum plaster, or you just get nowhere.

Q. What has been the experience of the Gypsum Company when they were just making gypsum plaster and did not handle gypsum board?

Mr. Cox. I think I will have to object to that.

The Court. Objection sustained.

Mr. Dallstream. I just want to use that as an illustration whether it is necessary for him to handle both soft board and hardboard just as it is necessary for the Gypsum Company to handle gypsum plaster and gypsum board.

The Court. Are you asking the question again?

Mr. Dallstream. No, your Honor; I was just explaining the purpose of the question.

The Court. Very well, your explanation will be noted.

Q. What about the question of selling hardboard and selling soft board in the same carload shipment at the full carload rate?

The Court. Hasn't that all been gone over at least two or three times, and I don't know how many more times it will be gone over, because I suppose we will have other witnesses, perhaps not as good as Mr. Dahlberg, and I am just wondering whether from this time on when other witnesses appear on the stand, it would not be just as well, unless they can improve the story that has just been told by this witness, to leave it alone. I think

633 perhaps we could get along a little bit faster in that way.

Of course, if somebody can contradict a particular story which has already been told, then you may have an opportunity to plug up the hole if you want to.

This applies also to the redirect examination, you understand.

Mr. Cox. I assumed, sir, that was the case.

Redirect examination by Mr. Cox:

Mr. Cox. I might say that it is my present intention to ask but a very few questions.

The Court. I don't mind iteration, but when it gets to reiteration——

Mr. Cox. I appreciate that.

Q. Mr. Dahlberg, you said that throughout this period of time your real desire was for a license to manufacture?—A. That is right.

Q. That is correct, is it?—A. Yes.

Q. When was the last time you asked Masonite for a license to manufacture?—A. At the conference with Gillies in my office, just during the time we were applying for a rehearing and writ of certiorari—I forget the exact date.

Q. You never asked for a license to manufacture since that time?—A. No, sir.

Q. In response to a question as to the benefits which your company gets from the contracts, you testified, as I understand it, that you felt from the commercial point of view it was necessary to have a full line of products in the building field?—A. Yes.

Q. And you could not have a full line unless you had the hardboard; is that correct?—A. That is correct.

Q. All right, Mr. Dahlberg, I will show you some exhibits

634 that were introduced this morning, and I will start with Defendants' Exhibit M, which is of structural glass; have you seen that kind of structural glass?—A. Yes.

Q. Couldn't you use this as a substitute for hardboard in your full line?—A. No, sir.

Q. All right. I am going to hand you a collection of these exhibits and ask you to point out to me whether there is any one of Defendants' Exhibit N, Defendants' Exhibit D, Defendants' Exhibit J, Defendants' Exhibit E, Defendants' Exhibit G, Defendants' Exhibit I, and K—I want you to tell me whether there is any one of those materials illustrated by those exhibits that can be used as a substitute for a full line if you do not have hardboard? A. No, sir; there is not.

Q. All right.—A. If you want any further explanation, I could probably give it to you. Some of these that would be or could be used for some purposes in place of hardboard, but for general utility, hardboard answers better, because for instance we handle these ourselves, except this plywood. Still we want hardboard.

Q. You testified on cross-examination that it had never been your desire to be a party to an arrangement which fixed prices at which you sold hardboard; is that correct?—A. That is correct.

Q. Have you expressed that feeling at any time to Masonite?—A. Yes.

Q. When was the last time you made an expression of that kind?

Mr. D[illegible]LLSTREAM. Will you repeat the previous question?

(Previous question read.)

635 By the COURT:

Q. It didn't make much difference to you what price hardboard sold for as long as Masonite maintained the same price and as long as it was a low price and everybody could canvass the entire market?—A. That is correct.

Q. If they put the price lower, you would get larger distribution and also make a larger commission?—A. That is correct.

The COURT. Probably you would meet more competition if the price were put down, if they were doing the same thing you were doing.

Mr. Cox. I think I have a question on the book that has not been answered.

Q. (Read) A. I think the last time I did that was at this meeting with Mr. Alexander when we had a sort of knock-down and drag-out fight in 1932.

Mr. Cox. I think I have finished.

The COURT. That is all.

Mr. Cox. Counsel for defendants and I have agreed if it is agreeable to your Honor to adjourn a little earlier this afternoon so that we can work on this stipulation of facts, which may shorten the trial considerably. I may say if we reach an agreement on the stipulation, I will have only one or two more witnesses.

The COURT. They are not sitting in the back of the room, are they, because I see a vast array of people there?

Mr. Cox. I hope they are not prospective witnesses. They are not my prospective witnesses at the moment, your Honor.

636 The COURT. Then I suggest, using your expression, that we rise now.

Mr. Cox. That was my intention, your Honor.

The COURT. Perhaps the defendants might take up the slack moments by putting on a witness.

Mr. Cox. I have a witness that I can put on now, but if this stipulation is entered into, it might suspend with him altogether.

The COURT. Let me know when you get through. We will take a recess.

(Short recess.)

(Adjourned to April 28, 1941, at 10:30 a. m.)

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NEW YORK, *April 28, 1941.*
10:30 o'clock, a. m.

TRIAL RESUMED

Colloquy

Mr. COX. May it please the Court, on Friday afternoon I was able to reach an arrangement with counsel for the defendants, under which we agreed in effect to stipulate as to certain matters which are both those involved in our case and those involved in theirs. Because of some of the difficulties it has not been possible to have that stipulation ready this morning, but they think, I believe, it will be ready this afternoon or they will be able to go to work on a draft this afternoon.

Mr. LAMB. I hope to have it ready by tomorrow morning.

Mr. COX. So I propose to put on two witnesses that I have planned to call, to testify very briefly, and at that point I shall rest, reserving my rights to reopen if any of the matters being negotiated are not agreed upon.

The COURT. That is entirely satisfactory. Will the defendants be ready to proceed?

Mr. TUTTLE. Your Honor, our thought was this. In our conference with Mr. Cox we found that what was desired by him on the one side and what was desired by us on the other side relative to a possible stipulation was pretty extensive. It required telephoning to various offices around town to get the infor-
638 mation, and numerous conferences with counsel. And we spent all Saturday at it. But I don't think we would really gain anything in the way of time by making an effort to go on after Mr. Cox rests, and I will join what I think is the implication of his suggestion, that we take an adjournment till counsel can all get together and wind this thing up so far as the stipulation is concerned. I know we will gain time rather than lose it. We are all very much ahead of our estimate as to the length of time this case would take, and I think it is largely due to the cooperation on all sides.

The COURT. You still haven't answered my question as to when you will start again.

Mr. TUTTLE. We could be ready tomorrow morning.

The COURT. All right.

Mr. COX. The first witness this morning will be Mr. Ames, and I have asked Mr. Hollabaugh to examine him.

CORTLANDT F. AMES, Jr., called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct Examination by Mr. Hollabaugh:

Q. Mr. Ames, with what company are you presently associated?—A. Johns-Manville Sales Corporation.

Q. And what is your position?—A. Manager of dealer building materials sales.

Q. Manager of dealer building materials sales?—A. Correct.

Q. What other positions have you held with the Johns-Manville Sales Corporation?—A. Prior to that I was assistant to the man who held the corresponding job under a different organization setup.

639 Q. When did you take your present position?—A. March 1933, I believe.

Q. March 1933?—A. Right.

Q. What are your duties in this position?—A. General supervision of sales of building materials that are sold through dealers.

Q. Through dealers?—A. Yes.

Q. How large a sales organization do you have in your department?—A. Today?

Q. Yes.—A. It is probably 275 in the number of salesmen. I presume that is what you mean.

Q. How much did you have in 1933?—A. Probably half that number. Probably, I should say, more like 125 to 150.

Q. About 125 or 150?—A. Yes.

Q. What part, if any, have you had in forming the policies of Johns-Manville Sales Corporation?—A. In respect to sales of materials?

Q. Yes.—A. Why, I have more or less quite a little to do with the policy in respect of sales; that is, how they will be sold and so forth.

Q. What is the relationship between Johns-Manville Sales Corporation and Johns-Manville Corporation?—A. Well, the former is a selling company subsidiary of the latter.

Q. And acts as a sales outlet for the products produced by Johns-Manville Corporation?—A. Correct.

Q. Does Johns-Manville Sales Corporation maintain warehouses and selling offices at various places throughout the country?—A. So far as I know the sales organization only operates two or possibly three warehouses.

Q. Where are they located?—A. West Coast. Los Angeles, San Francisco, Seattle.

Q. And at those warehouses you store hardboard supplies as well as insulation and other building materials?—A. No; so far as I know the only place where we are storing hard-

640 board today is San Francisco. The stock in Los Angeles was closed out.

Q. Does the Johns-Manville Corporation maintain any warehouses throughout the country?—A. Factories; where they warehouse materials.

Q. And they warehouse, I assume, materials at these factories?—A. Yes.

Q. Where are they located?—A. The principal location is Jar-

ratt, Virginia. We have warehouses at Manville, New Jersey, Waukegan, Illinois, and Marrero, Louisiana.

Q. And at these warehouses you keep both hardboard and insulation board?—A. During the last year we have discontinued the stocks of insulation board at Manville, Waukegan, and Marrero, and are running down our stocks of hardboard.

Q. From what warehouse do you fill your orders?—A. From Jarratt, Virginia.

Q. Your main warehouse?—A. And factory.

Q. Now, I ask you if you know of the contractual relationship between Johns-Manville Sales Corporation and Masonite Corporation?—A. Yes; I do.

Q. When did you learn for the first time in 1935 that Masonite proposed to revise the 1933 contracts?—A. It seems to me I first learned of it some time in 1936. The revision was made in 1936, wasn't it?

Q. Yes, sir.—A. I cannot tell you the exact date I first learned it.

Q. Do you know who first told you?—A. Frankly, I do not.

Q. Did you talk with anyone concerning the revision with any representative of Masonite Corporation?—A. Yes; I recall their counsel came down to New York and discussed with our counsel and myself the revision of the contract.

Q. You say he came down from New York?—A. To New York.

641 Q. Did you attend any conferences between your company and Masonite Corporation concerning the revision of the 1936 contract?—A. The only one I recall is that one when their counsel came down to New York. We had a consultation then when we went over the revised contract.

Q. What reason, if any, was given to you about the way the 1933 contracts were to be revised?—A. Simply that there were ambiguous paragraphs and points or bones of contention with some companies, which made it desirable in Masonite's estimation to spell the contract out in detail.

Q. Were those the only reasons you knew of?—A. That is all I knew of. Frankly, I was not concerned, because the new contract was satisfactory to us. They gave us a better discount. I wanted a more favorable contract arrangement, and as soon as I got that, I was not curious as to the reasons.

Q. During the period from December 1940 to March 1941, did you participate in any conference looking toward the revision of the 1936 contracts?—A. Yes; I sat with our counsel in a meeting of the attorneys in this case wherein they discussed the revision, my interest being to advise with counsel as to the business aspects in the changes that might be made.

Q. Where were those conferences held?—A. The conferences

were held, one in Chicago and one—the first one in Chicago, to decide, or wherein they discussed what they were going to do in a general way. The other meeting was held here in New York.

Q. Who was present at the Chicago meetings?—A. Practically all of the attorneys that I see here.

Q. Were any of their clients?—A. Yes; some of their clients—several of the Masonite men, Mr. Dahlberg, of Celotex, I am not certain, and just who else, I don't know.

Q. Who attended the New York meeting?—A. The same bunch of attorneys and the gentlemen representing the
642 Masonite Company, Mr. Alexander and Mr. Wallace were there.

Q. You stated a moment ago that you became manager of the building material sales in March 1933; at that time did you know Mr. Gillies?—A. I could not say whether I knew him then or became acquainted with him shortly thereafter.

Q. Did you know of the negotiations in 1933, in August, September, and October—of the negotiations between Celotex and Masonite, looking toward a contractual relationship between those two companies?—A. I merely knew Masonite and Celotex had been engaged in quite expensive litigation and were anxious to get out of it. Celotex lost and they were having some heavy discussions. Beyond that I know nothing.

Q. Did you during that period of time for your company approach Masonite looking toward some sort of a contractual relationship?—A. I did.

Q. When did you approach them?—A. Just when, the exact date, I could not say, but probably it was some time between the date of the Masonite decision in the Circuit Court and the last of August.

Q. Whom did you talk with?—A. Mr. Gillies.

Q. Did you go out to Chicago?—A. I probably saw him out there.

Q. And afterwards, did you carry on discussions with him by correspondence or personal conversation?—A. Yes; I negotiated with Mr. Gillies, talked with him, tried to get a contract or some arrangement under which we could sell hard board.

Q. Did you ask him during that time if they would sell hard board to you?—A. I did, but I got no satisfaction. Mr. Gillies' position was that he would not even consider talking to me
643 until he knew what they were going to do with the whole matter, and he wouldn't talk to me until then. In short, I got no satisfaction. This was all after the Circuit Court of Appeals decision, as I recall.

Mr. HOLLABAUGH. I ask that this be marked for identification.

(Marked "Government's Exhibit 24" for identification.)

Q. Mr. Ames, I hand you what purports to be a letter written

by you on September 5, 1933, to Mr. James P. Gillies, and ask you if you wrote that letter?—A. I expect I did.

Q. In this letter there is a reference to the letter of August 29th, do you remember the letter of August 29th or can you tell us with what it had been concerned?—A. As I recall, that letter was from Mr. Gillies, and the gist of it was that he was attaching a copy of the proposed contract that he was agreeable to extending to us, saying that he was extending similar contracts to other people. That was the first knowledge I had that we were going to be permitted to sell hard board.

Q. Was that a draft agreement or a draft form of contract which you later signed or which your company later signed with Masonite on November 30, 1933?—A. I am not certain that I understand what you mean by draft agreement. It was essentially, as I recall, the same as the contract we signed. It was probably revised in detail after our counsel or other people went there. It may have been modified slightly; how much I don't recall.

Q. He told you in this August 29th letter or about that time that Masonite contemplated making such contracts with others in the industry?—A. Correct.

Q. Did he name any of the others?—A. No, sir.

644 Q. Did he say that he was going to confine it to insulation board manufacturers?—A. I don't believe so.

Mr. HOLLABAUGH. I now offer this letter in evidence on the ground that it is an admission written by or made by Mr. Ames the Johns-Manville Sales Corporation manager.

Mr. CHANDLER. Without agreeing to the characterization of its being an admission, I have no objection to its going in.

The COURT. A letter from whom to whom?

The WITNESS. From me to Mr. Gillies.

The COURT. All right. What is the date of it?

Mr. HOLLABAUGH. September 5, 1933.

(Government's Exhibit 24 for identification received in evidence.)

Mr. HOLLABAUGH. That is all, Mr. Ames.

Cross Examination by Mr. CHANDLER:

Q. Mr. Ames, in response to questions of Government's counsel, you stated your position with Johns-Manville Sales since 1933. I would just like to ask when you first came with the Johns-Manville organization, and in what capacity?—A. August 1, 1928, as an assistant to Mr. Pakenham, who, as I said, had a corresponding position to what I now hold, under a slightly different organization.

Q. Now, in 1932 and 1933, were there discussions going on as to the adoption of a code for the Insulation Board Institute or Industry?—A. There were in 1933.

Q. In 1933?—A. Yes.

Q. You are quite right; 1933. And did you attend meetings in connection with that proposed code?—A. I did.

645 Q. Several of them?—A. A number of them.

Q. At the time you attended those meetings, were you aware of the existence of this patent infringement litigation between Masonite and Celotex?—A. Very much so. Hardboard was on the market, our dealers wanted it, and we wanted to be able to sell it to them, and yet because of this patent situation, we didn't dare touch it until the outcome of the litigation, our attorneys would not let us do anything in that respect, and then finally there was handed down the decision in favor of Masonite, giving them a monopoly under their patent.

Q. Was Johns-Manville at that time manufacturing hardboard?—A. No; we were not.

Q. Do you know, assuming that you at that time could have had patent clearance on the Masonite patents, approximately how much it would have cost to build a plant to manufacture hardboard?—A. Well, I don't propose to be an expert in the knowledge of what it would cost, but I would assume it would have been upwards of a million and maybe upwards of a million and a half dollars to get into that business, and at that time we were in the throes of a depression, so that the outlook for getting the money wasn't very good.

Q. You were in court on Friday of last week?—A. Yes.

Q. And you heard Mr. Dahlberg testify in general as to the reasons which prompted Celotex to desire some opportunity of getting hardboard for distribution to its dealers?—A. Yes.

Q. Were the reasons testified to by Mr. Dahlberg, in general, similar to those of Johns-Manville?—A. In general, they were very much the same. We wanted hardboard in order to be able to sell it to our dealers. Masonite, up to that time, had sold it to a selected number of dealers, and our dealers wanted

646 it and we were trying to keep them from going to Masonite or Celotex or somebody else back in the days that Celotex was selling it, and we wanted to get into the hardboard business so we could sell them and ship it in mixed cars.

Q. Leading up to the execution of the first agreement with Masonite in 1933, was the original approach with a request for the execution of that agreement or some agreement made by you to Masonite or by Masonite to you?—A. We approached Masonite. We were very anxious to be able to sell hardboard in mixed cars the same as other companies and be able to compete with them.

Q. I think you testified that at the time of your original approach Mr. Gillies said, in substance, that they had not made up their minds what they were going to do about the Celotex litigation or any agreement with Celotex, and until they had

crossed that bridge they did not know what they were going to be able to offer to you, if anything. Is that a fair statement?—A. That is it exactly. We had just gotten nowhere.

Q. In response to a question of government counsel, you identified Government's Exhibit 24 as a letter written by you to Mr. Gillies in September, 1933. Will you explain in your own words the circumstances which prompted you to write that letter?—A. As I recall, what I had in mind was this: There had been several meetings looking towards the adoption of an industry code for the Insulation Board Industry. The feeling in the industry was none too good. They had been kind of embittered by this lawsuit that has been discussed, between Masonite and Celotex. Mr. Gillies representing Masonite had just won the full decision, and he was sitting pretty, and his manner pretty much indicated that he was rather independent, and we were doing our best trying to get anywhere with the code. We wanted, as I mentioned before,
we wanted to sell hardboard, and got nowhere. Masonite
647 took the position that hardboard was a patented monopoly
and should not come under the code. Other people took the position, well, you are selling it in mixed cars with insulation board, and it certainly should come under the code.

Q. Let me ask you right there, the code that you are speaking of is the code for the insulation board industry; is that right?—A. Correct; the code for the insulation board industry. We were just getting nowhere on the code for that and a few other reasons, and so finally along came this letter from Mr. Gillies saying that he would extend the contract to us and was extending similar contracts to other people, and it looked to me as though that was going to remove one obstacle in the way of getting a code, because with a number of people selling hardboard, certainly it was an industry product and the road would be clear towards getting a code along those lines. It subsequently turned out along those lines.

Now then, if you have a code for insulation board, it was going to go a long ways towards stabilizing the insulation board industry.

Q. Was the purpose of the code to stabilize the industry?—A. That is the way it was generally understood.

Q. Well now, you got the contract from Masonite in 1933, and you have been operating under that contract and the revisions of it made in 1936 and 1941 ever since; is that correct?—A. Correct.

Q. Have those operations been profitable?—A. No sir, they have not. They have been unprofitable to us from a dollars and cents standpoint.

Q. Well, I think I am right that each of those contracts has had a cancellation clause. Will you explain why, if the contract has

been unprofitable, you did not cancel it?—A. We kind of had a bear by the tail. We don't like it, and we don't dare let go.
648 It is not very profitable, but we don't dare give it up because we need to sell hardboard and supply hardboard to our dealers along with insulation board, in order to be competitive with the rest of the industry.

Q. Has there ever been any question of Masonite cancelling the contract?—A. Masonite has never given us any indication of cancelling contracts, except we had a provision in one of these contracts—I forget whether it was 1933 or 1936—to the effect that we had to sell at least a million and a half feet every six months. For a time we were rather concerned that we might fall under that and give Masonite an opportunity to cancel if they wanted to. We took particular pains not to give them that opportunity. We wanted to be protected, and we protected ourselves.

Q. When you say you took particular pains not to give them that opportunity, what did you do?—A. We set up a system in our organization where every month the movement of hardboard was checked, and we ordered sufficient hardboard at the Masonite plant at Laurel to keep us up above a million and a half feet in every six months.

Q. Since entering into contractual relationship in 1933 with Masonite, have you developed any product of your own that is competitive in a general way with Masonite products?—A. We have. Johns-Manville Asbestos "Flexboard."

Mr. CHANDLER. May I have Defendants' Exhibits G and H, please?

Q. I show you Defendants' Exhibits G and H, which are specimens of Johns-Manville "Flexboard," and ask you if you will explain in a general way the composition of that material and what it is used for?—A. Well, this is a mixture of asbestos fiber and cement, formed on a machine and then pressed under
649 hydraulic pressure. It is used as an interior or exterior wall finish, and has many other uses. It would take me an hour to try to name them all, if I could remember them all. There are so many uses for interior and exterior walls. For instance, you might line a room like this, or as was testified, how the room at Laurel was lined. Another use that I can recall was the proscenium arch at the Center Theatre at Radio City. That is made out of "Flexboard," and it is used there because it is fireproof. It is used on exteriors, too, because it is really the only wall board product that can be used outdoors without any paint. Large quantities are used by Vice-President Wallace's Seed Corn Company—I have forgotten the name—but they use large sheets, and no exterior paint is needed for maintenance.

Q. Can that material be nailed and sawed, like wood?—A. Just as readily as wood. You can nail right through, without drilling. You can nail within a quarter of an inch of the edge and a carpenter can cut it with an ordinary saw. It works just like wood, except that it is noninflammable.

Q. It is fireproof, whereas wood is not?—A. Correct. It is absolutely noninflammable.

Q. What can you say as to the comparable qualities of "Flexboard" and hardboard with regard to water damage?—A. This material can be used in exterior use. It does not matter how wet it gets; it is unaffected and will dry out again all right, whereas hardboard is probably going to buckle and swell. I have heard of houses that have flooded, and afterward the Flexboard was perfectly O. K., but the hardboard had buckled and had to be replaced.

The COURT. I don't know whether you have got an idea that there are some customers in the room.

Q. I show you a bulletin, signed by you under date of March 15, 1934, and ask you whether that document was
650 sent on or about the date that it bears, to the persons to whom it is addressed?—A. I expect it was.

Q. Was that the document which, so to speak, introduced your "Flexboard" to the trade?—A. Yes, this is the first notice that went to—not to the trade, but to our sales organization.

Mr. CHANDLER. I offer that in evidence.

Mr. HOLLABAUGH. No objection.

(Marked "Defendants' Exhibit O.")

Mr. CHANDLER. Well, perhaps we can speed this up a little. I have another memorandum from Mr. Ames to offices and salesmen, dated April 24, 1934, on the same subject, which I should like to have marked. That is substantially the same as the other. I offer that in evidence.

Mr. HOLLABAUGH. No objection.

(Marked "Defendants' Exhibit P.")

Mr. CHANDLER. Another memorandum on the same subject, from Mr. Ames to building material and general salesmen, dated August 8, 1934.

Mr. COX. No objection.

(Marked "Defendants' Exhibit Q.")

Q. Who is Mr. L. H. Brennan?—A. L. J. Brennan.

Q. Excuse me [hands paper to witness].—A. That is a typographical error.

Q. I show you a document, signed L. H. Brennan. I understand that is a typographical error for L. J. Brennan?—A. Correct.

Q. Who is he?—A. Mr. Brennan is one of my assistants.

651 Mr. CHANDLER. I offer in evidence another document, L. J. Brennan to building material and general salesmen, dated February 15, 1941, and call attention particularly to the sentence, "To begin with, 'Deluxe Flexboard' is not just another tile board. Unlike competitive materials which are fabricated on a hardboard base, 'Deluxe Flexboard' is made on a base of asbestos and cement which has been specially waterproofed."

(Marked "Defendants' Exhibit R.")

Q. Mr. Ames, I show you a catalogue of Johns-Manville building materials and ask you whether that is a catalogue that was gotten out by your company?—A. It was; yes, sir; it is.

Q. I direct your attention particularly to pages 8, 9, 10, and 11, and I ask you what product is referred to on page 8?—A. Johns-Manville hardboard products are covered on page 8.

Q. And what are Johns-Manville hardboard products?—A. These are various thicknesses of hardboard, 1/8", 5/16" quarter-board and tempered hardboard.

Q. That is the material which is supplied to you by Masonite under the contracts which you had with Masonite, is that correct?—A. That is right.

Q. And what product is referred to on pages 9, 10, and 11?—A. That is J-M Asbestos, Flexboard, that is covered on those three pages.

Q. That is a product of your own manufacture?—A. Correct, we make that ourselves.

Mr. CHANDLER. I offer that bulletin in evidence.

Q. For the record, Mr. Ames, can you tell me about when that bulletin was gotten out?—The inside cover, you will
652 notice, says Copyright 1936. Would that be about the time?—A. On the inside cover it says Copyright 1936. I imagine it was brought out the first part of that year. It shows on the back, April 1936.

Q. Is that catalogue or one substantially similar to it, still in use?—A. Yes, we get out a catalogue like this every year.

Mr. COX. No objection.

Mr. CHANDLER. Defendants' Exhibit S is a letter that has been reserved for the stipulation, and I think we had better skip that for a moment and mark it "T."

(Marked "Defendants' Exhibit T.")

Q. Mr. Ames, when you brought out the Johns-Manville Flexboard in 1933, what steps did you take to make it competitive with Masonite hardboard?—A. I am sorry to correct you, but we brought it out in 1934.

Q. I beg your pardon, in 1934.—A. Previously we had made other types of asbestos cement sheets but none of 1/8" dimension for dealers' sales. They had always been priced by the square

foot, f. o. b. factory. When we came along with Flexboard, we wanted to make it as closely competitive to hardboard as we could, so we dropped the precedent and sold it on a thousand-foot basis and sold it delivered, to parallel the hardboard practice as closely as we could.

Q. How have your sales of Johns-Manville Flexboard compared in dollar volume with sales of Masonite hardboard under the del credere agreements?—A. The sales of Flexboard exceed the sales of hardboard almost two to one.

Mr. HOLLABAUGH. Will you ask about the dollar volume?

653 Mr. CHANDLER. I asked for dollar volume. Mr. Tuttle would like to ask you a few questions.

By Mr. TUTTLE:

Q. You have stated at the time Plaintiff's Exhibit 24 was written by you, to wit, September 5, 1933, an N. R. A. Code was under discussion for the insulation board industry, is that correct?—A. As I recall.

Q. And did that Code subsequently eventualize?—A. It did, in March of 1934.

Q. And was approved at that time, as shown by Defendants' Exhibit F which I put in evidence the other day?—A. That is so.

Q. And you have said that the various discussions concerned the methods of stabilizing the industry back in 1933 with a view to the working out of this Code?—A. I don't think I put it that way, Mr. Tuttle, as to the method of stabilizing, I simply referred to the Code as being designed to stabilize it.

Q. There was a discussion about wages?—A. Yes.

Q. Hours?—A. Yes, indeed.

Q. Costs?—A. Correct, as to whether we could have a cost system, and so forth.

Q. A cost accounting system?—A. Correct.

Q. Filing the prices?—A. Yes.

Q. Non-deviation from prices when filed except with the consent of the Government?—A. The Code required us to adhere to the prices——

Mr. Cox. I am going to object to this; the Code is in evidence and it shows what it contains.

Mr. TUTTLE. I agree with you that they are. I was asking about the period of discussion when this letter was written.

654 The WITNESS. Those points were all under discussion, Mr. Tuttle.

Q. In other words, all the matter which now appears in Defendants' Exhibit F, to wit, the approved Code as of March 1934, was under discussion back in September 1933?—A. That is so.

Q. And you were a participant in that discussion?—A. That is so.

Q. You have been asked a number of questions concerning this Flexboard—not that I want to detract in the slightest from what you said on the subject, but I would like to know how the prices ranged in comparison between that and our several products, for example—let me put it this way to you: you sold Flexboard I suppose in sheets or boards?—A. That is right.

Q. Then you sold it also in tile formation?—A. Some of the sheets were scored, as you see in this case:

Q. Was there a difference in price between the unscored and the scored?—A. Oh, yes.

Q. Just so as to bring it down to some near date, take the Fall of 1940, the period of 1940, can you tell me what the prices per thousand were for the scored and unscored—a thousand scored feet?—A. There are different prices of different kinds. Standard Flexboard which is the gray product, and which most closely competes with hardboard, was sold for $55 per thousand delivered. Then when we get into the decorative types like this, these samples, these more or less compete with the lacquered or painted Masonite.

Q. The Temprtile?—A. The Temprtile. That has been lacquered and painted. This material sells to dealers for around 13 to 16 cents per foot or $130 a thousand for the plain and $160 a thousand for the scored. Those prices are pretty close to being correct.

655 Q. You say "most nearly compete with Masonite product." Can you name the Masonite product with which it does compete?—A. Well, different "Flexboards" compete with different hardboard products. For instance, standard Flexboard competes with plain standard 1/8th-inch hardboard or with 1/8th-inch tempered hardboard and in each case the prices are within a couple of dollars per thousand of being the same.

Q. Yes.—A. Then when you get into the decorative material like this [indicating] for interior finish, it competes with the lacquered, the painted "Temprtile," and again these prices are what we consider as being in line with the market on the lacquered or painted "Temprtile," around 13 to 16 cents per square foot to the dealer.

Q. So that there is not only competition in quality or function but also competition in price?—A. That is correct, sir.

M. TUTTLE. I think that is all.

Redirect examination by Mr. HOLLABAUGH:

Q. Mr. Ames, a moment ago you spoke about the contractual relationship between Johns-Manville Sales Corporation and the Masonite Corporation, and you referred or stated that Johns-

Manville had the bear by the tail. What did you mean by that expression?—A. I just meant we have an unprofitable contract.

Q. You have an unprofitable contract?—A. Yes. We lose money selling hardboard, as near as we can tell, and the officers of our company are not at all happy about it, but we do not dare drop it and give it up because we must be able to sell hardboard in mixed cars with insulation board to compete with other manufacturers who are doing so.

656 Q. You have just finished testifying that "Flexboard" is a substitute for hardboard. Why then don't you put it in mixed cars with insulation board and let it take the place of hardboard?—A. There are good reasons for that. We make "Flexboard" at Nashua, New Hampshire, and Waukegan, Illinois. Our insulation board mill is Jarratt, Virginia. This material, in many parts of the country, under railroad tariffs, won't mix with insulation board at the same rate as hardboard takes. It takes a different tariff classification, a higher rate.

Mr. TUTTLE. When you say "this material" you mean——

The WITNESS. "Flexboard."

Q. And it is the freight rate that determines or is one of the prime reasons why you wish to continue the contract?—A. That is one very good reason. We can't ship Flexboard in mixed cars with hardboard because the railroad tariffs are different in various parts of the country. When we originally started with this, we could not ship it anywhere in mixed cars.

Q. But now you can?—A. In certain localities, we may be able to.

Q. Which localities?—A. I believe in certain parts of the northeast you can.

Q. But you can't in other parts of the country?—A. That is right. Anyhow, just let me complete my answer.

Q. Yes.—A. Anyhow, we will still probably have to be able to sell hardboard, because some people will want hardboard and our dealers will want to obtain a supply of hardboard.

Q. Even though "Flexboard" is a substitute?—A. Correct. It will never substitute completely for it.

Q. A minute ago you were speaking of the prices at which "Flexboard" was sold. Have you with you a price list for your "Flexboard" products?—A. No, I have not.

657 Q. A minute ago you were speaking of the meetings which you attended under the code or looking toward a code. Now, that was the insulation industry to which you were referring was it?—A. It was known and the code was known as the code for the insulation board industry.

Q. At those meetings were the proposed contracts between

Masonite and the defendants here discussed?—A. To the best of my knowledge, I never heard them discussed.

Q. Well, actually was the hardboard considered a part of the insulation board industry?—A. Some people thought so, as I said, thought it was, should be considered a part of or under the code, but Masonite for a long time said no, it was not.

Q. Then did they later say that they thought it should?—A. Yes; later they agreed to let it come under the code.

Q. When?—A. And stopped objecting. Just when, I can't say.

Q. Was it in 1933?—A. Whether it was 1933, the latter part of 1933 or the early part of 1934 prior to the code, I could not say; my memory is not that good.

Q. And the letter of August 29th referred to the—this letter from Mr. Gillies—A. This is my letter to Gillies.

Q. Well, do you recall whether or not Mr. Gillies made any reference to the insulation code meetings?—A. I don't think so.

Q. You don't think so. Was there any reference at all to the work of the insulation board industry in working up a code?—A. I believe it was just briefly to the point, "Here is the contract we extend to you. We will extend similar contracts to other people as well."

Re-cross-Examination by Mr. CHANDLER:

Q. Mr. Ames, one of my associates says that in answering one of the questions by the Government you said that
658 "Flexboard" could not be shipped in mixed cars under the same tariff with hardboard. I think you meant to say soft board.—A. Insulation board. A slip of the tongue.

Q. Insulation board?—A. Correct.

(Witness excused.)

PAUL A. WARD, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct Examination by Mr. Cox:

Q. Mr. Ward, what is your present occupation?—A. Vice President in charge of Sales, Wood Conversion Company.

Q. How long have you held that position?—A. As vice president since January 1, 1940.

Q. Of 1940?—A. Yes, sir.

Q. What position did you hold before that?—A. General sales manager.

Q. How long have you held that position?—A. Since June 1, 1936.

Q. What position did you hold before that?—A. Assistant sales manager.

Q. What were your duties as sales manager? A. Director of the entire sales organization of the company.

Q. What are your duties as vice president?—A. The same.

Q. There has been no change since you became vice president?—A. No, sir.

Q. Does the Wood Conversion Company have selling offices in any states other than the state where its principal factory is located?—A. The sales department maintains district sales offices in New York, Chicago; a district office in St. Paul; a division office, or a smaller office, in Dallas, Texas; and we maintain office space in Tacoma, Washington.

659 Q. What is the organization of those district offices?—A. The organization has a district manager who supervises the men working directly under him in the territory.

Q. Mr. Ward, do you remember whether, in the fall of 1936, you ever saw Mr. Wallace?—A. I did.

Q. Do you recall where and when you saw him?—A. I probably saw him a number of times throughout the fall.

Q. Do you remember whether you ever saw him in the month of October?—A. I did.

Q. Where?—A. In St. Paul.

Q. Who else was present when you saw him?—A. As I remember, Mr. Alexander and Mr. Saberson and Mr. Lewis, their counsel.

Q. Was anyone else there who was associated with Wood Conversion Company?—A. Mr. E. W. Davis, our general manager.

Q. And do you remember what you said at that conference?—A. Well, we discussed the terms of the then presented new del credere agency contract.

Q. What did you say about its terms?—A. Well, at that time I had brought up several points that we wanted clarified, such as—I don't know who brought the points up, probably between Mr. Davis and myself there were several points brought up for discussion, one of which had to do with the way we handled the insurance of Masonite products in our warehouse.

Q. What was that discussion about?—A. Well, we wanted to cover the Masonite products, the hardboard products, in our warehouse under our complete coverage floater insurance policy.

Q. But you did not want to take out a separate policy?—A. That is correct.

Q. What else was discussed at that meeting?—A. Well, at that particular meeting we discussed the idea that some assurance should be included in the contract that Masonite's

660 sales organization would adhere to the terms of the contract, in the way of their price adherence on their products, the same as they expected us to; also in qualification or approval

of wholesalers that they would act with speed to insure our getting our jobbers approved as rapidly as their own sales organization would get their jobbers approved, merely to put our organization completely competitive with Masonite.

Mr. Cox. Will you mark this, please?

(Marked "Government's Exhibit 25" for identification.)

Q. Mr. Ward, I hand you what purports to be a photostatic copy of a letter dated October 20, 1936, addressed to you by Mr. Fletcher Lewis, and I ask you whether you recall having received that letter?—A. I do.

Q. I also call your attention to the fact that in the first paragraph of the letter there is a reference to a meeting in St. Paul. Is that the conference you have been telling us about in your testimony?—A. It is.

Mr. Cox. I offer the letter.

Mr. TUTTLE. I object to the receipt of the letter. I suppose it is offered because of some theory of admission.

Mr. Cox. It is offered because Mr. Lewis was acting in these matters as counsel for Masonite, and particularly because the second paragraph on the second page is an admission by Mr. Lewis as to the purpose and effect of these contracts. Also because it shows the state of mind of the defendants Masonite and the Wood Conversion Company.

Mr. TUTTLE. That being the purpose I object to the letter as incompetent, irrelevant and immaterial, because we do
661. not think there has been any foundation laid to show that Mr. Lewis had any authority to make admissions that would bind the Masonite Corporation, or anybody else. His view as to the construction of the law, or, indeed, construction of any draft that was then under consideration would be simply his own as counsel, and in no way binding upon Masonite Corporation, and also not binding upon the addressee of the letter.

Mr. Cox. I understand that there is no——.

The COURT. I will take it for what it is worth. It may not be much. I don't know.

Mr. TUTTLE. Exception, please.

The COURT. Anybody want to ask any question about anything?

Mr. Cox. I think that is all.

Mr. TUTTLE. Just a moment. I didn't know you were through.

(Government's Exhibit 25 for identification marked in evidence.)

Cross-Examination by Mr. TUTTLE:

Q. I think I have but one question, or two. What was your

position at that time, October 20, 1936?—A. General sales manager.

Q. Did you know Mr. E. W. Davis in the Wood Conversion Company?—A. I did.

Q. Was he your superior at that time?—A. He was.

Q. What was his position?—A. General Manager.

Q. And what you were doing in this connection was under his direction?—A. It was.

Mr. TUTTLE. I have no further questions.

662 Mr. Cox. At this point I think we shall rest, reserving, as I said, the right to reopen on any of the matters now being negotiated. There are some documents which the defendants have agreed to give us, but I shall wait until the stipulation is negotiated to offer them.

Mr. TUTTLE. If the Court please, I understood that it would be Mr. Cox's suggestion, and I certainly would join in such suggestion, that pending the working out of these stipulations, which work is well along and which I think can be accomplished by perhaps the middle of the afternoon, if not the end of the afternoon, we should suggest to your Honor that we would save time by taking an adjournment until tomorrow morning.

Mr. Cox. I join in that suggestion.

The COURT. We will adjourn, then, until tomorrow morning at half-past ten.

(Adjourned to Tuesday, April 29, 1941, at 10:30 a. m.)

663 NEW YORK, *April 29, 1941.*
10.30 o'clock a. m.

TRIAL RESUMED

Mr. Cox. May it please the Court, yesterday I was given at various times statements which had been prepared by the counsel for a number of the defendants, and this morning I have received a number of additional statements from defendants who had not prepared theirs in time to give them to me yesterday. I think in the circumstances that the case might move along faster if we had another day in which to look at those, and Mr. Tuttle has agreed to join with me.

The COURT. All right, I will put the case over until tomorrow at half-past ten.

(Adjourned to Wednesday, April 30, 1941, at 10.30 a. m.)

664 NEW YORK, *April 30, 1941.*
10.30 o'clock, a. m.

TRIAL RESUMED

Offering of exhibits

Mr. Cox. At this time I should like to offer in evidence nine documents which I am informed by Mr. Dallstream are all of the patents owned or controlled by the Celotex Company which relate in any way to hardboard.

Mr. DALLSTREAM. That is correct.

(Marked "Government's Exhibit 26.")

Mr. Cox. At this time I should like to offer the consolidated balance sheet of the Celotex Company in receivership as of October 31, 1932, which consists of one four-page printed document; the consolidated balance sheet of the Celotex Company in receivership as of October 31, 1933, which likewise consists of a four-page printed document; the consolidated balance sheet of the Celotex Company in receivership as of October 31, 1934, which likewise consists of a four-page printed document, and the annual reports to the stockholders of the Celotex Corporation for the years 1935 to 1940, inclusive.

(Marked "Government's Exhibit 27.")

Mr. Cox. Mr. Sewell, counsel for the Insulite Company, has called my attention to the fact that the table which ap-
665 pears on page 71 of the chief stipulation, which purports to show the annual footage sales of hardboard products by the Insulite Company is not correct. He has furnished me with a substitute table which, as I understand it, contains the correct figure, which I would like to offer at this time.

This is to be taken as a substitute for the table which appears on page 71 and is marked Exhibit S–57.

Mr. QUARLES. Mr. Cox, you haven't offered the stipulation itself yet.

Mr. Cox. That has been called to my attention, that perhaps there is some doubt in the record as to whether the chief stipulation was offered, and it was assumed it was, and that was my intention when I offered it the first day. If there is any doubt about it I would like to offer it now.

(Footage table marked "Government's Exhibit 28.")

Mr. Cox. Mr. Finck has called my attention to another mistake in the stipulation, the chief stipulation, which I shall correct at this time.

The mistake occurs in Paragraph 13 of the stipulation, at

page 7, in the last sentence. The last sentence as it presently appears in the stipulation reads:

"National Gypsum began the manufacture and sale of fiber structural insulation board about April, 1930."

As amended the sentence should read:

"National Gypsum began the distribution of fiber structural insulation board in the year 1930, and began manufacturing its own structural insulation board in the year 1938."

666 At this time I should also like to offer a table which has been given to me by Mr. Dallstream, showing the gross domestic sales of Masonite hardboard products by the Celotex Corporation for the eight fiscal years ended October 31, 1933 to 1940, inclusive.

(To Mr. DALLSTREAM.) Is this freight in here?

Mr. DALLSTREAM. Well I am not sure, but I think that that is the billing price at which it was billed to the dealers and wholesalers to whom we sold it. If there is any change in that I will supply a stipulation for the record.

Mr. Cox. We will take it subject to any correction that you care to make later.

(Marked "Government's Exhibit 29.")

Mr. Cox. At this time I offer a document dated October 16, 1936, addressed to Harris Trust & Savings Bank, 115 West Monroe Street, Chicago, Illinois, signed "Masonite Corporation. by R. G. Wallace, Armstrong-Newport Company by H. R. Peck," and by Harris Trust & Savings Bank, Escrow Agent, by F. O. Mann. I have been informed by counsel for Masonite that they will stipulate that a similar letter was delivered to the Harris Trust & Savings Bank, executed by each of the following companies:

The Celotex Corporation, Johns-Manville Sales Corporation, National Gypsum Company, Insulite Company, Wood Conversion Company, and Hawaiian Cane Products, Ltd., at or about the same time as October 16, 1936.

Mr. TUTTLE. We so stipulate.

Mr. LEWIS. Mr. Cox, our stipulation should be that similar escrow letters were delivered to the Harris Trust & Sav-

667 ings Bank at various dates from some time in the month of June 1936 through until the last week in October of 1936.

Mr. Cox. I accept that.

While they are examining that letter I think, your Honor, I might say that we have agreed now upon a number of these stipulations which contain some of the material which I might have elicited from witnesses if I had called them as my wit-

nesses, and some material which might have been elicited by the defendants if they had called them as theirs. I suggest that the desirable procedure to follow now, if it is agreeable to counsel, is to have those that have been agreed upon given to the stenographer and taken as part of the record, being offered partly in my case and partly as part of the defendants' case.

Mr. TUTTLE. We agree to that.

(Marked "Government's Exhibit 30.")

Mr. TUTTLE. Following what Mr. Cox has just said, I will present for the purpose stated by him stipulation agreed upon between the Masonite Corporation and counsel for the plaintiff. There are quite a number of exhibits attached to this stipulation, sir, and we have marked these SS with a numeral in sequence. And the purpose of that is to show by the letter SS that these exhibits attached to this second stipulation made by the Masonite Corporation and the numbers are independent of the sequence of exhibits that are offered in the course of the trial.

The stipulation is not signed, because we understand that it has been agreed to by both sides and will be taken in bodily by the stenographer into the record.

668 The stipulation follows:

Stipulation (Masonite Corporation)

It is further stipulated between defendant Masonite and the plaintiff in this action, subject to the same reservations accompanying the Stipulation of Facts heretofore made under date of April 22, 1941, as follows:

1. The main constituent of woody fiber is cellulose, which comprises approximately 50% of the material after the removal of extractives. The second main constituent is lignin. The lignins form an encrusting layer on the cellulose fiber and also hold together the fibers themselves. The lignins are the binding materials in the natural woody growth and are also the material which forms the bond in the hardboard manufactured by Masonite.

Steps carried out in the manufacture of Masonite hardboard are:

Disintegration of wood by explosive discharge from a region of high pressure steam;

Retention of the lignins on the fibers;

Formation into a sheet or lap;

Application of heat and pressure sufficient, depending on the moisture content of the sheet, to cause the cementing together of the fibers by remaking the lignin bond.

In addition to the above described lignin bond, supplemental

bonding may be secured by addition of extraneous binders; and Masonite uses such a supplemental bond in the manufacture of "tempered" products.

669 The lignin bond has many advantages. In the first place it helps to produce products which are similar to wood, and which may be handled and fabricated like wood, but which are without many of the disadvantages of wood, such as grain, knots, unequal expansion and the like. In the second place, the lignin bond is economical. The cheapest methods of disintegrating wood retain the lignins, these methods being grinding or other mechanical disintegration, explosion and the like.

2. After the making of the "Del Credere Factor Agreements" there were many more salesmen offering Masonite hardboard. For example, during the year 1939, the number of salesmen of Masonite and of the Del Credere Factors who were offering Masonite hardboard in addition to other building materials aggregated 1362, divided as follows:

Masonite Corporation	92
Armstrong Cork Co	66
Celotex Corporation	192
Certain-teed Products Corp	193
Johns-Manville Sales Corp	275
National Gypsum	280
Wood Conversion Co	55
Insulite Company	60
Dant & Russell, Inc	77
The Flintkote Co	92

3. The Exhibits submitted herewith, hereinafter referred to, marked Exhibits SS2, SS4, SS13, both inclusive, are compiled on the basis of defendant Masonite's fiscal year which ended August 31.

670 4. There is submitted herewith, marked Exhibit SS1, and made a part hereof a diagram showing the trend of dealer carlot prices for the major Masonite hardboard products in the Eastern zone of the United States for the years 1926 to 1940, both years inclusive.

5. There is submitted herewith, marked Exhibit SS2, and made a part hereof a diagram showing the trend of average prices received from the sales of the Masonite hardboard products shown therein in the domestic market (United States of America) for the years 1927 to 1939, both years inclusive. In making the chart, Exhibit SS2, there have been included all domestic hardboard sales, that is, sales to the industrial purchasers, sales through the Del Credere Factors and direct sales in the United States market. These average prices were computed by dividing

total dollar sales, including freight and Factors' commissions by the total footages sold. The figures through 1940 are not presently available, but the table, if extended, would in all probability show slight changes, if any, with the exception of DeLuxe Quartrboard which would show a slight rise. There are submitted herewith, marked Exhibits SS20 and SS21, and made a part hereof illustrative industrial price lists in effect for the years 1938 and 1940. There were no industrial price lists issued in 1933 to the best of our knowledge.

6. There is submitted herewith, marked Exhibit SS3, and made a part hereof a tabulation showing the savings achieved through carlot or mixed carlot purchases of Masonite hardboard products in the Eastern zone at the prices effective February 1, 1940.

671 Mixed carlots are full carlots which are made up in part of hardboard and in part of insulation-board products. Under the present price structure in mixed carlot purchases, each class of product is sold at the full carlot price enabling the purchaser to secure the savings as shown. The term "L. C. L." indicates less than carlot shipments.

7. There is submitted herewith, marked "Exhibit SS4," and made a part hereof a chart showing the Masonite hardboard sales made by various outlets, to wit, sales made by Masonite Corporation direct, those made by Masonite Corporation to industrial purchasers, sales made by Masonite Corporation in export and the sales made by Masonite Corporation through the Del Credere Factors operating under the "Del Credere Agency Agreements."

8. There is submitted herewith, marked "Exhibit SS5," and made a part hereof a chart showing the domestic sales of Masonite's hardboard through all outlets by product classes for the years 1927 to 1940, both years inclusive.

9. There is submitted herewith, marked "Exhibit SS6," and made a part hereof a chart showing the relation of operation to capacity of the Masonite Corporation's manufacturing plant Burden for each of the years 1931 to 1940, both years inclusive.

10. There is submitted herewith, marked "Exhibit SS7," and made a part hereof a table showing the net graded production of Masonite hardboard products (converted to 1/8" basis) for the years 1928 to 1940, both years inclusive, showing the

672 total production of Quartrboard and Presdwood, respectively, the amount of off-grade products and the percentage that the off-grade products bears to the total production. In the years other than 1931 to 1934, both inclusive, culls were not included in total production.

11. There is submitted herewith, marked "Exhibit SS8," and made a part hereof an analysis of Masonite Corporation's manufacturing costs of all products, to wit, hardboard and insulation board, showing the relative proportions of Labor, Material, and Burden for each of the years 1931 to 1940, both years inclusive.

12. There are submitted herewith, marked "Exhibits SS9, SS10, SS11, and SS12," and made a part hereof four charts showing the relative change in Material and Labor Costs in the production of standard Presdwood products and tempered Presdwood products, respectively, during the years 1933 to 1939, both years inclusive, and comparing those changes with the relative change in dealer carlot prices of the same products for the same periods. This comparison can best be made by overlaying the charts which are on transparent material, to wit, SS9 and SS11 over the corresponding cost analyses for the same products, to wit, SS10 and SS12, respectively, and thus reading the charts together. The data for 1940 is not available. If presented, it would show a substantial increase in Labor costs. In making charts SS10 and SS12, the average annual Material and Labor costs per thousand square feet of board produced were
673 first secured by dividing the total Material and Labor costs of producing standard and tempered Presdwood, respectively, by the total footage of standard and tempered Presdwood, respectively, produced. The indexes showing trends were then computed by dividing the average Material and Labor costs, respectively, for each year by the average Material and Labor costs, respectively, for 1933.

13. There is submitted herewith, marked "Exhibit SS13," and made a part hereof a diagram showing the research expenditures for all purposes of Masonite Corporation for the years 1930 to 1940, both years inclusive.

14. There is submitted herewith, marked "Exhibit SS14," and made a part hereof, excerpts from the standard specifications for temporary housing issued by the Office of the Quartermaster General of the United States War Department on September 9, 1940, giving certain material specifications for defense housing.

15. There is submitted herewith, marked "Exhibit SS15," and made a part hereof a map showing the geographical location of the hardboard jobbers purchasing directly from Masonite Corporation and purchasing through its "Del Credere Factors" for the year 1939.

16. There are submitted herewith, marked "Exhibits SS16, SS17, and SS18," and made a part hereof three tables showing the respective sales of insulation board and hardboard by footage and by dollar volume for each of the defendants herein

674 for the years 1933, 1936, and 1940. (In the case of the years 1933 and 1936 the defendants Dant & Russell, Inc. and The Flintkote Company have been omitted.) Said tables show the amount of products manufactured and sold and the amount of products purchased from other sources and sold or sold as selling agent by the various defendants, respectively, in so far as the same are products mentioned in the tables.

17. There is submitted herewith, marked "Exhibit SS19," and made a part hereof a table showing the sales of insulation board as reported by the members of the Insulation Board Institute for the years 1929 to 1939, both years inclusive. The dollar volume is not available. The Insulation Board Institute includes most of the larger distributors of insulation-board products, but does not represent the entire industry.

18. After October 10, 1933, when and as the additional Del Credere Factor Agreements were made by defendant Masonite Corporation, copies thereof were furnished to the existing Del Credere Factors pursuant to the requirements of the Del Credere Factor Agreements requiring the giving by Masonite Corporation to the agents of such information.

19. Since 1934 Masonite Corporation has annually expended well over $100,000 for advertising its hardboard products.

(The exhibits referred to in the foregoing stipulation received in evidence and marked "Defendants' Exhibits SS1, SS2, SS3, and SS4 to SS21, inclusive.")

675 Mr. TUTTLE. In that connection, and before the stipulations made by the other individual defendants are taken up, it has been agreed that I should make this statement on the record on behalf of the Masonite Corporation:

That at the respective times of the del credere agreements, it was the understanding of Masonite that the said agreements required Masonite itself to sell to its own dealers and wholesalers in accordance with dealer price lists and wholesalers' compensation schedules, respectively, as the same were published by it from time to time; and as to the agreement of 1941, whether it does or does not expressly require that Masonite shall itself sell in accordance with its published catalogs and price lists, the fact is that it is the settled and determined policy and intention of Masonite at all times to adhere to the prices set forth in its published catalogs and price lists.

While I am on my feet, I suggest that we deem included in the record and as part of it, the opinions of the Circuit Court of Appeals and of Judge Nields in the patent litigation between Masonite Corporation and the Celotex Receivers.

Mr. Cox. I assume those opinions are matters of which the Court could take notice, but I have no objection.

The COURT. I should think so.

Mr. TUTTLE. As long as they are either by notice or by reference fundamentally a part of this record in the case, that is all right with us.

Mr. SEWELL. Your Honor, I would like to offer for the record a stipulation which has been agreed to between the Insulite Company and Government counsel. This is likewise unsigned.

676 *Stipulations*

I might state that this stipulation recites that there are attached to it as exhibits two samples of the hardboard manufactured by Insulite at the time of the commencement of the Faxon Lumber Company suit. Both of those samples have not as yet been received, and I understand that it is physically difficult to attach them to a stipulation anyway, but I understand that when they do, we can submit them as if they had been attached.

Mr. Cox. I have agreed to that.

(The stipulation referred to is as follows):

Stipulation (Insulite Company)

It is stipulated between the attorneys for the plaintiff and for the defendant, The Insulite Company, subject to the same reservations accompanying the Stipulation of Facts heretofore made under date of April 22, 1941, that if E. W. Morrill were called as a witness in this trial, he would testify as follows:

1. E. W. Morrill has been an employee of The Insulite Company (hereinafter sometimes referred to as "Insulite") continuously since 1932 and prior to that time was with Insulite for four years, from 1925 to 1929. From 1933 to April, 1939, he was Sales Manager of Insulite. During the same years Mr. E. H. Batchelder, Jr. was Vice President of Insulite in charge of sales. Mr. Batchelder left the company in April, 1939, at which time Mr. Morrill became Vice President and General Sales Manager, in which capacity he has continued to date. Insulite does not know the present whereabouts of the said E. H. Batchelder, Jr. Mr. Morrill has personal knowledge as to the matters hereinafter set forth.

677 2. Insulite is a Minnesota corporation, and has been engaged since about 1914 in the manufacture and sale of insulation board products. It was the first company in the field of insulation board products, and insulation, or soft, board, has always been and is its primary product. Its manufacturing operations were and are conducted in the mill at International Falls,

Minnesota, owned by Minnesota and Ontario Paper Company (hereinafter sometimes referred to as "M and O"). Throughout the years under consideration M and O has owned all of the outstanding stock of Insulite. In the year 1933 and subsequent years, the Insulite head offices were in Minneapolis in the offices of M and O. The President of the company was Mr. R. H. M. Robinson, who was also one of the two Receivers of M and O, and after July, 1934, one of the three Trustees in bankruptcy of M and O. The operations of Insulite were conducted as a department of the operations of M and O. Insulite's books and records were kept by the same employees that kept the books and records of M and O and affiliated companies. The same man was in charge of manufacturing operations for M and O and Insulite, and the same is true as to the traffic manager, the credit department and pay-roll and treasury department.

3. In 1929 M and O purchased and installed a hardboard press in its mill at International Falls at a cost of slightly in excess of $40,000. The market for hard-board products was in the process of development, and in the years 1930 and 1931 the press was used in experimental work in manufacturing different kinds of hard-board. The production was small and was sold in the 678 market. In 1932 production was started in larger quantities, and the hard-board was sold by Insulite in the United States as well as in the export market.

4. The process employed by Insulite in the production of hard-board at the time of the commencement of the Faxon Lumber Company suit was as follows:

Wood was reduced to pulp by means of grindstones.

The resulting pulp was passed through a screen to remove the coarsest parts.

Alum-and-rosin size was added for waterproofing. A binding material of the nature of an oil or emulsion was run into the tank and mixed with the pulp.

From the pulp a wet board was formed and cut into insulation board blanks.

These blanks were passed through a hot air drier.

The blanks were placed on surface plates in a platen press having twenty openings, each of the press platens being provided with a wire mesh screen on its under side.

The press platens were heated by means of steam.

The press was closed and pressure applied by means of hydraulic rams, converting the insulation board blank into a hard-board.

After the hot pressing was completed the press was opened and the boards permitted to remain for a time on the hot platens in the open press, whereupon the boards, having wire screen marks on the back, were removed as finished boards.

5. In July 1933, Mr. Dyke, patent counsel for The Masonite Corporation (hereinafter called "Masonite"), wrote Mr.
679 A. C. Paul of the firm of Paul, Paul & Moore, patent attorneys representing Insulite, advising of the decision in the Masonite-Celotex patent suit and notifying Insulite of possible action if it continued to manufacture and sell hard-board.

6. The records and files of Insulite do not disclose with certainty whether Masonite approached Insulite or Insulite approached Masonite subsequent to the decision in the Masonite-Celotex suit on the subject of the distribution by Insulite of Masonite products, nor has Insulite been able to determine this fact with certainty. On or about September 1, 1933 Insulite received a copy of a form of the Masonite del credere agency agreement. So far as Insulite can determine, this was received from Masonite.

7. In the fall of 1933, the Insulite Sales Department initiated a comprehensive survey of the building trade to ascertain facts upon which Insulite could decide whether or not to sell Masonite hardboard rather than its own hardboard products. During 1932 and later years Insulite manufactured and sold two hardboard products, each $^{11}/_{64}$ inch in thickness, one sold as light hardboard and one as dark hardboard.

8. For some time prior to and during the summer of 1933 Insulite district managers and salesmen were reporting a strong demand on the part of builders and dealers for a varied line of hardboard products, i. e., for particular hard board products not manufactured or sold by Insulite, and particularly for quartrboard, such as was manufactured and sold by Masonite.
680 The above-mentioned field survey resulted in reports to Mr. Morrill by Insulite district managers and salesmen confirming the strong builder and dealer demand for a complete line of hardboard products and particularly for quartrboard. It became increasingly evident to the Sales Department that a more varied line of products than Insulite then produced was needed if Insulite were to retain its dealer accounts not only for hardboard but for insulation board as well, for dealers generally desired and still desire to procure their requirements of both products from one source of supply. Furthermore it was reported to the sales organization of Insulite by certain of its customers that there was distinct sales resistance to the light colored board manufactured by Insulite, as compared to the dark colored board manufactured by Masonite.

9. At this time Mr. R. W. Andrews, the Chief Engineer of the M and O system, made an investigation and reported that it would cost from $225,000 to $250,000 for new machinery and equipment sufficient to enable Insulite to manufacture a varied line of products that could compete with the Masonite line and could satisfy

the builder and dealer demand for such products and particularly quartrboard.

10. In spite of the pressure from the Sales Department, however, after full consideration of the matter, in December, 1933, the executives of Insulite finally decided to refuse to enter into any arrangements with Masonite for the sale by Insulite of Masonite products, and Masonite was formally advised of this decision in December, 1933.

11. Of the export sales of hardboard made by Insulite in
681 1933, practically the entire 4,741,953 square feet were sold in export to the Insulite Company of Finland, a subsidiary of Insulite, which owned and operated a mill in Finland. In 1934 only 210,580 square feet were sold in export other than to the Finnish subsidiary, 3,888,177 square feet being exported to the Finnish subsidiary. The Finnish subsidiary entered upon the manufacture of hard-board in 1936, and thereafter the export sales of Insulite decreased substantially in the year 1936 and subsequent years to 1939.

12. The main business of Insulite has always been and now is the production and sale of soft board. The development of hard-board products was undertaken to supplement and aid the sale of soft board products to the builder and dealer trade. The production and sale of hard-board was always incidental to the main business of Insulite.

13. In 1934, reports continued to come in to the Insulite Sales Department and to Mr. Morrill, reporting a continued strong builder and dealer demand for a full line of hard-board products and particularly for quartrboard, and there were also increasing reports of the loss of dealer accounts and possible loss of further accounts if quartrboard and other hard-board products could not promptly be supplied by Insulite. In the summer of 1934 Insulite lost the business of Wood Conversion Company, one of its largest customers, because of its inability to supply its demand for a full line of hard-board products, and the Insulite sales of hard-board in 1934 were substantially under its 1933 sales.

14. The developments in 1934 confirmed Mr. Morrill's
682 opinion that the builder and dealer demand for a full line of hard-board products made it imperative for Insulite to distribute Masonite's products; and he believed that no other products competitive with Masonite products available to Insulite would answer such demand.

15. As heretofore stated, Insulite estimated that the cost of the machinery and equipment (exclusive of mill space) sufficient to enable Insulite to manufacture an extended line of hard-board which would compete with the Masonite line, was at least $225,000. During the years 1932 to 1935, the cash position of Insulite was

extremely bad, and its operations in those years were conducted at a loss. M and O had been placed in equity receivership in the United States District Court, District of Minnesota, Fourth Division, on February 28, 1931, and continued in receivership until July, 1934, at which time trustees were appointed in bankruptcy proceedings under Sec. 77B. During the years 1932 to 1935 Insulite owed substantial amounts to M and O and during the same years the operations of M and O were also conducted at a loss, and its cash position also was severely restricted. Insulite was dependent for its capital requirements on M and O. In 1932 it owed the parent company approximately $700,000, which indebtedness increased steadily in succeeding years, amounting to approximately $1,200,000 by December 31, 1935. Under these circumstances it was utterly impossible to finance the purchase and installation of the machinery and equipment required to broaden Insulite's line of hard-board products.

16. Furthermore, on December 3, 1934, Mr. R. W. Andrews reported to Mr. Batchelder substantially as follows: That for the first ten months of 1934 the total shipments of hard-board from the mill at International Falls, Minnesota, amounted to approximately 6,800,000 feet; that the manufacture of the above amount of hard-board took the place of at least 28,000,000 feet of Standard-Insulite (insulation board), that is, at least 28,000,000 feet of Standard-Insulite could have been made on the machines at the same time and with the same labor and stock; that the mill overhead would have been reduced per day or per month and therefore the overhead charges per thousand feet would have been considerably less had the hard-board been eliminated and the production been allocated entirely to Standard-Insulite; that in the manufacture of the above amount of hard-board there had been produced at least 1,000,000 feet of cull or waste material in excess of the similar cull or waste that would have been experienced in the manufacture of Standard-Insulite; and that from the production viewpoint alone, the above figures indicated to Mr. Andrews that the production of hard-board should be eliminated. The foregoing report is partially explained by the fact that the Insulite hard-board process started with the manufacture of a board on the machines that produced soft board, which board was later put through the hard-board process; and that the presses took approximately four times as long to produce a given amount of hard-board as a similar quantity of soft board. 683

The "cull" or "waste" referred to in said report was in part defective or off-grade board, and in part pure waste.

The manufacture of hard-board, therefore, cut down Insulite's capacity to produce soft board. Furthermore, the profit

684 to Insulite on the sale of its soft board was substantially more than the profit resulting from the sale of its hard-board.

17. For the foregoing reasons it was decided to attempt to make an arrangement with Masonite to distribute the Masonite products. The Insulite files and records do not indicate whether Insulite approached Masonite to negotiate such arrangement, but it is the belief of Mr. Morrill that this was the case. A conference was arranged in Minneapolis in the first week of January, 1935, at which Mr. Gillies and Mr. Saberson representing Masonite were present, with their attorneys, in which conference Mr. Morrill participated with other officials of Insulite. In this conference the discussion involved in addition to the general subject, the matter of sales in export by Insulite. Following this conference, the Trustees of M and O caused Insulite to enter into the agreements with Masonite set forth in paragraph 38 of the Stipulation of Facts, dated April 22, 1941, pursuant to the order of the Federal District Court for the District of Minnesota, all as set forth in said Stipulation of Facts. At the time when said agreements were entered into with Masonite, Insulite knew that Masonite had other agents for the sale of its hardboard products acting under agreements substantially similar to the one entered into by Insulite, and it knew the identity of these agents.

18. Such agreements and the succeeding agreements were entered into because of the conclusions reached by the responsible executives of Insulite that the builder and dealer trade demanded a full line of hard-board products and particularly demanded
685 quartrboard, that Insulite could not retain its dealer and builder accounts unless it could supply the desired line of products and that no other products competitive with Masonite products available to Insulite would answer such demand; further, that accounts had been lost and would be lost in the future not only for hard-board but for soft board as well if Insulite did not have available the hard-board products desired by the trade.

18a. Insulite entered into the contracts of February 2, 1935, and the succeeding agreements with Masonite for the reasons above set forth. In entering into said agreements and in entering into the subsequent agreements with Masonite, Insulite had no intention to further monopoly or to restrain trade or to control prices.

19. Mr. Morrill belives, and the records of Insulite indicate, that Mr. E. F. Batchelder, Jr., attended a conference at the Masonite offices in Chicago on September 24, 1936.

20. To the best of the knowledge and belief of Mr. Morrill, there has never been any verbal understanding or agreement between Insulite and Masonite except as contained in the express provisions of the contracts between the companies, with this qualification,—

if it should be held that the written agreements between Insulite and Masonite did not expressly or impliedly provide that in sales of its hardboard products by its own employees Masonite should adhere to its published prices at which sales were made through its agents, Mr. Morrill would testify that such was the
686 understanding between Insulite and Masonite; nor has Insulite at any time agreed with Masonite not to distribute in the United States products competitive with hard-board. On the contrary, in 1937 and 1938, the Insulite Sales Department made a considerable survey of the market for plywood, which is a product competing strongly with Masonite hardboard products. Such survey was made to ascertain whether or not Insulite could purchase plywood at a low enough figure to make a desirable profit upon resale. Insulite's survey indicated that plywood could be obtained only at a price which afforded a profit margin to Insulite of approximately 10%, a margin not sufficient to cover sales costs and give a reasonable profit.

21. To the best of the knowledge and belief of Mr. Morrill, in no conference with any official or representative of Masonite in 1933, 1934 or 1935 did the latter ever suggest or ask for an understanding or agreement from Insulite to the effect that the latter would not distribute products commercially competitive with hardboard and no one in the Insulite organization ever reported to Mr. Morrill that such suggestion had been made by Masonite representatives.

22. The profits made by Insulite upon the distribution of hardboard products under the Insulite-Masonite contract have not been substantial, but, on the contrary have been very insubstantial.

23. Masonite has never asked the views, advice or consent of Insulite with reference to the particular price for any hardboard products of Masonite and there have been no conferences between Masonite or any of its representatives and Insulite
687 or any of its representatives at any time with reference to the setting of particular prices of any product. Prices at which sales through Insulite were to be made have at all times been fixed by Masonite without consultation with Insulite. Except as indicated in Paragraph 20 hereof, Insulite has never entered into any agreement or understanding with any of the other defendants in this case as to the price of any of Masonite's hardboard products.

24. Stocks consigned to Insulite by Masonite were physically segregated from the products of Insulite in the warehouse or warehouses of Insulite, but they were not specifically marked as the property of Masonite.

25. Insulite did not publicly advertise Masonite products as the products of Masonite nor did it publicly advertise that it was

acting as agent of Masonite, but this was generally known to the trade, all of the members of the Insulite sales organization were informed of the fact that the Masonite hardboard products sold under the Insulite trade names were the products of Masonite and the salesmen of Insulite frequently disclosed this fact to the trade. Insulite salesmen frequently ran into the claim that the hardboard distributed by Insulite was not comparable with the hardboard products made by Masonite, and Insulite salesmen regularly combatted this claim by stating the fact,—namely, that the hardboard distributed by Insulite was Masonite hardboard.

26. At all times since the execution of the original del
688 credere agency agreement Insulite has covered consigned stocks in transit under a general floater policy under which the loss, if any, was payable to The Insulite Company and Masonite Corporation as interest may appear.

Consigned stocks of goods in the factory and mill of M and O at International Falls, Minnesota, have at all such times been covered against fire and tornado insurance by M and O under a policy or policies covering generally the mill and its contents, the policy providing that the contents were covered whether owned by M and O or by a third person. Such policy or policies were payable to M and O or to the Trustee under the First Mortgage of M and O as its interest might appear.

27. Attached to this stipulation and marked "I A and I B" are samples of the hardboard manufactured by Insulite at the time of the commencement of the Faxon Lumber Company suit.

28. Attached to this stipulation and marked "II," is a list of the patents of Insulite relating to hardboard, together with true copies of all such patents.

29. Attached to this stipulation and marked "III" is a photostatic copy of a letter dated July 7, 1936, addressed to Mr. C. S. Pope, Insulite Company, 1000 Builders Exchange Building, Minneapolis, Minnesota, purporting to be signed by Masonite Corporation, which letter was received by Insulite on or about July 8, 1936.

(The exhibits referred to in the foregoing stipulation marked "Defendants' Exhibits I A, I B, II and III.")

689 Mr. Briggs. If your Honor please, at this time I should like to offer two stipulations between plaintiff and defendant Wood Conversion Company to be copied into the record:

Stipulation (Wood Conversion Company)

Subject to the reservations contained in the Stipulation of Facts made herein under date of April 22, 1941, it is hereby stipu-

lated by and between plaintiff and the defendant Wood Conversion Company as follows:

I. That this defendant has no patents covering hard board.

II. That this defendant never put up any signs in its warehouses indicating that the Masonite hardboard therein was the property of Masonite but it did keep Masonite hardboard in its warehouses piled separately from the other products handled by it,

III. That this defendant, before the making of the March 20, 1941, agreement between Masonite and this defendant, never advertised Masonite hardboard as Masonite's product or that it was acting as Masonite's agent in the distribution of Masonite hardboard.

IV. That on June 24, 1934, this defendant knew that del credere agency agreements existed between Masonite and the following companies: Celotex, National Gypsum, Johns-Manville Sales, Armstrong, and Hawaiian Cane Products, Ltd.

That on October 28, 1936, this defendant knew that del credere agency agreements existed between Masonite and the following companies: Celotex, National Gypsum, Johns-Manville
690 Sales, Armstrong, Wood Conversion, Insulite, and Hawaiian Cane Products, Ltd.

That on March 31, 1941, this defendant knew that del credere agency agreements existed between Masonite and the following companies: Celotex, National Gypsum, Johns-Manville Sales, Flintkote, Dant & Russell, Insulite, Armstrong, and Certain-teed.

V. That this defendant covered consigned stocks of Masonite hardboard by its own blanket insurance policies.

It is hereby stipulated by and between the plaintiff and the defendant Wood Conversion Company that if E. W. Davis, Vice-President and General Manager of said defendant, were called as a witness herein, he would testify as follows:

I. Said E. W. Davis is and since February 9, 1937, has been Vice President and General Manager of this defendant, Wood Conversion Company. Before that and from April 7, 1921, he was General Manager of said defendant. As such executive officer he, during all of said times, personally managed and directed the operations and business of this defendant and on behalf of this defendant he was personally responsible for the negotiation, making and carrying out of the terms of the written agreements between Masonite and this defendant mentioned and referred to in Paragraphs 38, 39, 41, and 42 of the Stipulation of Facts herein dated April 22, 1941.

II. This defendant entered into each of the aforesaid con-
691 tracts because it wanted Masonite hardboard in the line of products it was distributing to the trade for the following reasons:

(a) This defendant thought that Masonite hardboard was a superior product in great demand.

(b) Masonite hardboard was of greater uniformity of structure, stronger, more waterproof, more attractive in appearance, more diversified in items and capable of being put to a greater number of uses than any other artificial board.

(c) There was no other artificial board that could, in general, successfully compete with Masonite hardboard.

(d) This defendant wanted to be in a position to compete with other distributors which were handling Masonite hardboard.

(e) The cost of construction and equipment of a plant by this defendant to manufacture a hardboard would have been prohibitive from a commercial standpoint.

III. Masonite determined the prices to be charged by this defendant for Masonite's hardboard without at any time asking approval thereof by this defendant and there never was any agreement between Masonite and this defendant as to such prices except as contained in the aforesaid written agreements.

IV. The aforesaid agreements during the times they respectively were or are in force set forth the entire understanding between Masonite and this defendant, with the exception of an agree-
692 ment between Masonite and this defendant that Masonite would make freight allowances on hardboard shipped from Laurel, Mississippi, to Cloquet, Minnesota, to offset geographical disadvantage.

It is the understanding of Wood Conversion Company that the del credere factor agreements of 1934 and 1936 between Masonite Corporation and Wood Conversion Company expressly require Masonite Corporation to make its own direct sales of Masonite hardboard to dealers and wholesalers at the same prices at which it directed its agents to sell the same; and while there was no specific discussion of this matter between Wood Conversion Company and Masonite Corporation regarding the 1941 agreement, Wood Conversion Company understood that Masonite Corporation would uniformly continue the policy of making its direct sales of Masonite hardboard at the same prices at which it required its agents to sell the same.

V. This defendant at no time entered into any agreement with any other "del credere factor" as to the price of any hardboard product.

VI. This defendant intends to observe strictly the provisions of the March 20, 1941, agreement between Masonite and this defendant free from observance of any and all provisions of the cancelled 1936 agreements not included in the said March 20, 1941, agreement.

Mr. FINCK. If the Court please, at this time I would like to offer the stipulation agreed upon between National Gypsum Company and the plaintiff, to be copied into the record.

693 (The stipulation is as follows:)

Stipulation (National Gypsum Company)

It is hereby further stipulated, by and between the plaintiff and the defendant National Gypsum Company, subject to the same reservations accompanying the Stipulation of Facts heretofore made under date of April 22, 1941, that in lieu of calling M. H. Baker, President of the defendant National Gypsum Company, as a witness, that said M. H. Baker if called as a witness in this trial would testify substantially as follows:

That he is now President of National Gypsum Company and has been such since May 14, 1929.

That prior to October 31, 1933, and on or about May 15, 1933, he, as President of National Gypsum Company, opened negotiations with defendant Masonite Corporation, requesting the privilege of distributing Masonite hardboard products.

That at all times prior and subsequent to October 31, 1933, all negotiations with defendant Masonite Corporation, relating to the distribution of Masonite hardboard products, were carried on for National Gypsum Company by him.

That on or about August 29, 1933, National Gypsum Company received a proposed "sales and license agreement" from Masonite Corporation. Thereafter, on or about October 31, 1933, he executed on behalf of National Gypsum Company the agreement with Masonite (Exhibit S-30 of said Stipulation of Facts); that in connection with said agreement National Gypsum Company had no negotiations with Masonite, or any of its representatives, or with any of the "del credere agents," or with any of their representatives, with respect to the provisions of said agreement:

694 that at the time National Gypsum Company entered into said 1933 agreement it did not know specifically if any other company distributing building materials, except Celotex Company, would be a "del credere agent" to distribute Masonite hardboard products.

That defendant National Gypsum Company did not execute any of the agreements, referred to in said Stipulation of Facts dated April 22, 1941, on the condition that Masonite Corporation would enter into similar or identical agreements with any other person, firm, or corporation, except that prior to the execution of the agreements between Masonite Corporation and National Gypsum Company, dated October 29, 1936, and March 20, 1941, Masonite informed National Gypsum Company that other "del credere agents" would be offered similar agreements.

That the defendant National Gypsum Company did not have at any time any conference or any agreements or understandings whatsoever, with Masonite, or any of its representatives, or with any of the "del credere agents" or their representatives, with reference to setting or determining the particular prices which Masonite would set under the said agreements, or with reference to the particular prices at which the "del credere agents" would sell such Masonite hardboard.

That defendant National Gypsum Company entered into all of said agreements with Masonite only for the purpose and reason that it desired to have hardboard, manufactured by Masonite, as one of the products which it could offer for sale and distribute to its customers; that said hardboard is now and was in
695 great demand in the building trade which is served by defendant National Gypsum Company and it is now and was a distinct advantage, from a sales point of view, for National Gypsum Company to have hardboard included in its line of merchandise.

That in executing each of said agreements with Masonite, National Gypsum Company did not desire or intend to enter into any agreement or understanding whatsoever with any of the other "del credere agents" individually or collectively, as to any of the provisions of said agreements, or as to any other matter whatsoever; that National Gypsum Company did not at any time have any discussion with Masonite, or any of the "del credere agents," concerning the terms or provisions of any of said agreements, except that counsel for National Gypsum Company attended several conferences of attorneys representing Masonite and other "del credere agents" relating to the 1941 agreement.

That it is now and was his understanding at the times when said agreements were executed, that all of said agreements contained provisions to the effect that Masonite Corporation would not enter into contracts with others for the sale of Masonite hardboard upon more favorable terms and conditions than those granted to National Gypsum Company, unless such terms and conditions were also granted to National Gypsum Company, and that at least on one occasion after the execution of similar agreements with other "del credere agents" Masonite Corporation sent copies thereof to National Gypsum Company.

That prior to March 20, 1941, defendant National Gypsum Company, did not put up signs in its warehouses indicating that the hardboard on the floor of such warehouses was there on consignment and was the property of Masonite Corporation.
696 However, wherever Masonite hardboard was placed in defendant National Gypsum's warehouses it was segregated

from its other products and was easily physically distinguishable from such other products.

In selling Masonite hardboard to its trade defendant National Gypsum Company did not advertise that hardboard which it offered under the "del credere" factors agreements as being manufactured by the Masonite Corporation, but sold it under its trade name "Gold Bond."

That the stocks of Masonite hardboard consigned to National Gypsum Company were covered by blanket insurance policies payable to National Gypsum Company only.

Mr. HULL. At this time, your Honor, I would like to offer a similar stipulation on behalf of Dant & Russell, Inc., as agreed to by counsel Dant & Russell and the Government.

(The stipulation is as follows:)

Stipulation (Dant & Russell, Inc.)

1. It is further stipulated between the plaintiff and Dant & Russell, Inc., one of the defendants herein, subject to the same reservations accompanying the stipulation of facts hereto, made under date of April 22, 1941, that if Glenn W. Cheney should testify on behalf of Dant & Russell, Inc. (referred to as "Dant & Russell" herein), his testimony would be as follows:

2. That he has been employed by Dant & Russell for the
697 past 24 years and is its Department Manager and has been employed in that capacity since 1930. That he was responsible for the negotiating, making, and carrying out of the agreements between Dant & Russell and Masonite Corporation. That Dant & Russell is an Oregon corporation and has been in the business of distributing structural insulation board since August 1, 1930. That it is also a distributor of plywood, lumber and other allied building materials.

3. That on June 19, 1937, Dant & Russell was made a "del credere factor" by Masonite Corporation for the distribution of Masonite's hardboard, and such agreement is set out as Exhibit S45 attached to the stipulation of facts. That such agreement was entered into entirely at arm's length with Masonite and Dant & Russell had no intention of entering into any contractual arrangement with any of the other defendants. That Dant & Russell had nothing to do with the negotiations leading up to the agreements as set out in paragraph 39 of the stipulation of facts, and in fact had no knowledge of the negotiations or the existence of such agreements until long after such were executed. That Dant & Russell had no part in the negotiations which resulted in the contracts entered into between Masonite and the other defendants in the years 1936 and 1937 and as referred to in paragraphs 41 and 44 of the stipulation of facts. That Dant &

Russell instituted on its own behalf the negotiations which led up to the making of its contract with Masonite on June 19, 1937, entirely independent of the other defendants. That Masonite Corporation never at any times asked for Dant & Russell's
698 views, advice or consent with reference to what would be a proper price for hardboard products. Except as provided in the "agency" agreements set forth in Exhibits S45 and S50 of the stipulation of facts, Dant & Russell never at any time had any agreement or understanding with Masonite Corporation or with any of the other defendants with reference to the price which should be charged for products it distributes.

4. That Dant & Russell never entered into any conferences with representatives of Masonite Corporation or other del credere factors concerning the particular prices at which hardboard should be sold, and as a matter of fact the first knowledge Dant & Russell had of price changes was Masonite's telegraphic announcements immediately previous to the time such were put into effect. That the contracts as referred to in paragraphs 45 and 50 of the stipulation of facts cover the entire agreements and understandings between Dant & Russell and Masonite Corporation, and that there were and are no understandings aside from those set out by the terms of these agreements. That it was Dant & Russell's understanding that the 1937 agreement expressly obligated Masonite to make its direct sales to wholesalers and dealers at the same prices at which it authorized the agents to sell. That Masonite made no contrary representations during the negotiations for the 1941 agreement and Dant & Russell assumed that that practice would be continued. That Dant & Russell's motive in becoming an "agent" of Masonite was to supplement its line of building products by the addition of hardboard and thereby obtain the advantage of shipping it in combination with its
699 other products so as to more economically service its dealers and place Dant & Russell on a more competitive basis with the other distributors who handled Masonite's hardboard.

5. That on June 18, 1937, Dant & Russell knew that there existed del credere agency agreements between Masonite and several of the other defendants.

6. That on March 31, 1941, Dant & Russell knew that del credere agency agreements existed between Masonite and the following companies: Celotex, National Gypsum, Johns-Manville Sales, Flintkote, Insulite, Armstrong, and Certain-teed.

7. That Dant & Russell is not now and never has been a member of the Insulation Board Institute.

8. That while the agreement of June 19, 1937, was in effect, Dant & Russell insured Masonite products under a "blanket" in-

surance policy which made general provision for the insurance of all property in its warehouses, including property which was owned by persons other than Dant & Russell.

9. That while the agreement of June 19, 1937, was in effect, Dant & Russell did not place signs in its warehouses to indicate that the hardboard stored there was the property of Masonite Corporation but it did keep all such stocks separate and segregated from other products.

10. That while the agreement of June 19, 1937, was in
700 effect, Dant & Russell advertised Masonite hardboard products under its own brand names although the dealer trade was aware that such hardboard was manufactured by Masonite.

11. That sometime previous to March 20, 1941, Dant & Russell was notified by representatives of Masonite Corporation that it was planned to draw up a new agency agreement to take the place of the one then in effect. That except for counsel, Dant & Russell was not represented in any of the meetings or negotiations which led up to the drafting of the new agency agreement of March 20, 1941. That following the drafting of such agreement, a copy was forwarded to him which he executed on behalf of Dant & Russell, and it is the purpose and intent of Dant & Russell to observe the terms, conditions, and provisions of said agreement of March 20, 1941, which is set out as Exhibit S51 in the stipulation of facts.

Mr. Cox. Before all these stipulations are offered, I would like to say, your Honor, that I am not objecting to the admission of any of them, but in certain instances we might be expected to have grave doubt as to the relevancy of certain testimony. I do not expect to do anything about that now, except as to one category of allegations, which I propose to touch upon by motion to strike, but I think I would better reserve that until they are all in, instead of doing it piecemeal.

I should just like to ask Mr. Sewell, if my understanding is now correct, that we have in the record all of the orders entered in the receivership or bankruptcy proceedings with Insulite which related directly to the execution of the contract between In-
701 sulite and Masonite. Is my understanding correct as to that?

Mr. SEWELL. If the Court please, I don't think I am prepared to answer that categorically. We have in the original stipulation of facts, according to my memory, a statement authorizing the trustees of the parent company, causing Insulite to do this. I am not prepared to say of my own knowledge whether there are any further orders in the case of subsequent agreements, but I will be glad to find that out.

Mr. Cox. Will you find that out, please.

Mr. SEWELL. I don't believe there are any further orders in the stipulation. Just a moment, I am informed that there was an order, and I am sure we can get that printed.

Mr. COX. Except for Mr. Dallstream's stipulation, those are the only stipulations that are ready at the moment, but the others are to be worked out shortly and I understand Mr. Tuttle is prepared to put on a witness.

Mr. DALLSTREAM. Celotex Corporation desires at this time to submit as part of the record in this case the stipulation between Celotex Corporation and the Government, dated April 29, 1941, and in addition thereto, a further stipulation covering certain proceedings in the receivership and bankruptcy court in Delaware, which is likewise a stipulation joined in by both Celotex Corporation and the plaintiff in this cause:

Stipulation (Celotex Corporation)

The attorneys for the plaintiff and the attorneys for defendant, The Celotex Corporation, hereby stipulate and agree to the
702 following matters and statements of fact, subject to the right of either the plaintiff or said defendant to object thereto on the grounds of relevancy or materiality:

If Carl G. Muench and Treadway B. Munroe were called as witness at this trial, or if B. G. Dahlberg were recalled as a witness for defendant The Celotex Corporation, they would testify of their own knowledge to the facts and circumstances hereinafter set forth. The failure of the defendants herein to call said persons as witnesses shall not give rise to, or otherwise support, any inference that the testimony of said persons, had they been called as witnesses, would have given other or additional testimony or that the same would have been unfavorable to the defendants or any of them as to the facts and circumstances hereinafter stated or otherwise appearing in the record.

Their testimony would be as follows:

1. Throughout the entire corporate life of The Celotex Company Mr. Dahlberg was its president and chief executive officer and Mr. Muench and Mr. Munroe were vice presidents, and their duties embraced collectively the direction of every phase of the activities of the company's affairs.

During the Receivership and Trusteeship of The Celotex Company these same three persons performed as employees of the Receivers and the Trustees, respectively, subject, however, to the direction of the Receivers and the Trustees substantially the same type of work they had theretofore performed with respect to the

management of the business during operation by the Receivers and the Trustees.

703 The Receivers and Trustees of The Celotex Company while they were operating its business and, since that time, The Celotex Corporation, have sold the hardboard products distributed by them under the agreements with the Masonite Corporation from time to time in force by affixing to the packages containing such hardboard products labels identifying such products with trade names adopted by them. Masonite refused to permit them to utilize Masonite's trade-mark or trade name upon such products allegedly for fear Masonite might in some manner impair or invalidate its right to the exclusive use of such trade-marks and trade names. However, since the execution of the 1941 agreement with Masonite The Celotex Corporation has ordered labels carrying a clear definitive statement to the effect that such hardboard products are manufactured by Masonite and are distributed solely as agent, and will hereafter affix such labels to its packages.

2. In the magazine and periodical advertising of the products distributed by it, The Celotex Corporation has not called attention to the fact that the hardboard products distributed by it were the products belonging to the Masonite Corporation or manufactured by Masonite or that such hardboard products were sold solely as agent. The failure so to do was not occasioned by any desire on the part of The Celotex Corporation to mislead the public with respect to such facts or because it did not recognize the ownership of such hardboard products by Masonite or to conceal the fact that The Celotex Corporation was distributing the same solely as agent, but for the reason that it appeared unnecessary so to do be-

704 cause of the belief of The Celotex Corporation that there was knowledge on the part of the customers to whom it distributed such products of the nature and character of the agency arrangement which existed as between the Masonite Corporation and The Celotex Corporation with respect to the distribution by The Celotex Corporation of hardboard products manufactured by Masonite.

3. Immediately upon the Receivers entering into the 1933 agreement with Masonite, the Receivers caused notice to be given to all of the customers of the Receivers, and all other distributing outlets which The Celotex Company and the Receivers were accustomed to solicit for business, of the results of the patent litigation which had been carried on with Masonite and of the fact that arrangements had been worked out whereby the Celotex organization would be enabled to distribute Masonite hardboard products. During the early years under the operation of the 1933 agreement there grew up a practice on the part of some overzealous Masonite salesmen of inferring to the distributing outlets that the hardboard

products distributed by Masonite's own personal selling force possessed some advantageous characteristics which Masonite did not make available to the customers of Masonite purchasing through the del credere agents. This resulted in a bitter controversy between Celotex and Masonite, and the Receivers of the The Celotex Company gave widespread publicity to this situation and placed in the hands of all salesmen and sent to dealers affidavits showing that the hardboard products distributed by Celotex under the 1933 agency agreement were identical with those distributed by Masonite, through its personal selling force. A copy of
705 the affidavit so used is submitted herewith, marked Exhibit CEL. II, and made a part hereof. As a result of this and the newspaper publicity which accompanied the final decision in the patent litigation between Celotex and Masonite, and the fact that the salesmen of The Celotex Corporation constantly advised distribution channels of the identity of the hardboard products distributed by it with those distributed by Masonite by its own selling force, and such facts have been of common knowledge in the Building Trade.

4. During the period while the 1933 and the 1936 agreements with Masonite were in effect, the hardboard products consigned by Masonite to the warehouses of The Celotex Company, the Receivers and Trustees of The Celotex Company, and The Celotex Corporation, were physically segregated so that they could always be identified but no separate signs were placed upon the consigned Masonite hardboard to indicate ownership by Masonite Corporation.

Immediately upon the Receivers entering into the 1933 agreement with Masonite, the Receivers received a demand from Masonite to show compliance with the clause requiring the Receivers to maintain insurance upon the consigned inventory of hard products being distributed by the Receivers under the terms of the 1933 agreement. The Receivers immediately applied to an insurance company for a policy covering the stocks of hardboard products distributed by the Receivers under the 1933 agreement with loss payable solely to the Masonite Corporation. Such policies together with proof of the stability of the insurance companies handling such risk was furnished to and approved by
706 Masonite. Such policies continued in effect until after the receivership and trusteeship and during a portion of the year 1935. In 1935 The Celotex Corporation engaged insurance experts to advise with respect to the various policies of insurance maintained by The Celotex Corporation and in an effort to effect economies in insurance cost, and as a result of their advice The Celotex Corporation took out blanket policies covering all of its properties and all stocks of merchandise in its possession irrespec-

tive of the ownership thereof and caused such policies to be endorsed with a loss-payable clause providing that loss thereunder should be payable to the Masonite Corporation as its interest might appear. Such character of policy containing such loss-payable clause endorsement in favor of Masonite was maintained until April 1, 1941, when Masonite agreed to provide its own insurance upon all consignment stocks pursuant to the 1941 agreement.

5. Upon the Celotex Corporation acquiring the business of The Celotex Company and its Receivers and Trustees, Mr. Dahlberg became president of The Celotex Corporation and Mr. Muench and Mr. Munroe became vice presidents thereof and their duties collectively involved the direction of every phase of the business and affairs of The Celotex Corporation. Mr. Dahlberg, Mr. Munroe, and Mr. Muench were at all times directors of The Celotex Company and The Celotex Corporation, except that Mr. Munroe resigned as director in May, 1939. Mr Dahlberg still continues to be president and Mr. Muench still continues to be vice president of The Celotex Corporation. Mr. Munroe remained as vice
707 president of The Celotex Corporation until May, 1939, when he resigned to permit the recuperation of his health. Since that date he has served in an advisory capacity.

6. The Celotex Company (to which The Celotex Corporation is a successor upon reorganization under Section 77B of the Bankruptcy Act) was organized in 1920 by a small group which included Bror G. Dahlberg, Carl G. Muench, and Treadway B. Munroe. Mr. Dahlberg had had a broad business experience as an executive in the paper industry and in marketing problems. Mr. Muench had had a broad experience in plant engineering and management concerned with pulp and fibrous products. Mr. Munroe was a research chemist with broad experience in the vegetable fibre and pulp field and had experimented for some years with various types of fibrous materials and with insulation products. They envisaged a form of very light weight insulation for building construction, to have such insulation qualities as would produce satisfactory insulation against heat, cold, and noise, and at the same time to have structural qualities as great or greater than wood and form a base for acceptable finish by applying plaster, paint and other finishing treatment. Their hope was to find basic material for the manufacture of such a product as would possess the following characteristics:

First. It should preferably be a waste material having no other substantial commercial use.

Second. It should be a material recurring annually and
708 in sufficient quantities to afford at all times an adequate manufacturing supply.

Third. It should be a product available at a point where a plant for its conversion could be located with an assurance of an adequate supply of labor and transportation facilities permitting national distribution at reasonable cost.

Careful investigation and research involving experimentation with a variety of vegetable materials including among others oat and wheat straws, rice straw, corn stalks, ramie, banana stalks, cotton stalks, etc., and bagasse, resulted in their decision to endeavor to manufacture their new insulation product using bagasse as the basic material. Bagasse is the refuse of fibrous waste material remaining after the grinding of sugar cane and extracting therefrom all of the cane juice capable of being extracted in the process of manufacturing sugars and molasses and syrups. After thorough investigation, bagasse appeared an ideal material for the new proposed insulation product. It had no value except as a low-grade fuel in the boilers of the sugar plant, and as a matter of fact was burned in dutch ovens ahead of the boilers primarily to dispose of it, for if left in piles it took years to disintegrate and if spread on the fields, as is usual with corn stalks, it was so resistant to decay, it could not successfully be plowed under. The sale of such material by the sugar mills was a distinct advantage to them and from The Celotex Company standpoint bagasse had the following advantages:

709 1. It could be purchased at a low price based upon its fuel equivalent and in the volume required.

2. It was an annual crop and was concentrated in a comparatively few hands.

3. The fibre that could be recovered from the bagasse had qualities that rendered it particularly suited for the required purpose.

4. As pointed out above, it had no competitive market; and

5. It was produced in a territory affording a fairly ample supply of labor and a not-too-unfavorable transportation cost in distributing the finished product.

A plant was constructed at Marrero, Louisiana, just outside New Orleans and this plant along with additions now represents an investment of over $8,000,000. The earliest product was a rough insulation board scarcely comparable to any of the present products of The Celotex Corporation but it represented a new product of merit. It was light, durable, had structural strength and good insulating characteristics. It was the first acceptable product of its kind. The local lumber dealer did not handle materials of that character and the greatest difficulty was experienced in carrying on the promotional work necessary to induce him to handle the product. In order to induce him to do so, it was necessary to create both public acceptance and demand.

710 The Celotex Company, beginning back in 1920, pioneered the development of structural insulation and through years of labor, research and expense produced inventions covering structural insulation, built factories for its manufacture and promoted the use and public acceptance of structural insulation. It developed the local lumber dealers (of which there are more than 20,000 throughout the United States) as the principal source of distribution of such type of material, and through years of effort built up an acceptance by such dealers of wall board as a regular item of their sales inventory.

Prior to 1920 insulation of homes and dwellings was practically unknown. During the next ten years, largely through the promotional efforts of The Celotex Company, insulation became accepted as virtually a requirement in the construction of livable homes and dwellings. The Celotex Company having developed structural insulation and secured its public acceptance and widespread use, and established the dealer distribution of such products, many of the companies engaged in the manufacture and distribution of other building materials and supplies were attracted to this field. Plant after plant was constructed by various manufacturers of building material for the manufacture of structural insulation, until finally the business developed and built up by The Celotex Company became one of the most highly competitive industries in the building material field, so that today there are more than fifteen large plants in the United States engaged in the manufacture of structural insulation, and most of the large distributors of building supplies are engaged in both the
711 manufacture and distribution of structural insulation. Through years of development several hundred different items of structural insulation products have been developed and are a part of the line now manufactured and sold by The Celotex Corporation.

On the formation of The Celotex Company, F. B. Munroe was elected Vice President in Charge of Research and Development and a director of the company, which position he retained until that company went into receivership in June, 1932. He was then retained by the receivers as an employee, in which capacity he continued supervision on their behalf of the type of work handled prior to the appointment of said receivers. On the formation of The Celotex Corporation in 1935 Mr. Munroe was elected a Vice President and director and continued to handle research and development work in addition to other duties. During this entire period Mr. Munroe has been in direct charge of research and development work as well as supervision of patents and patent litigation in addition to other duties.

Shortly prior to 1929 The Celotex Company developed a process whereby it could produce through the processing of bagasse, a hard panel board having substantially the same uses and functions (as well as general appearance) as the hardboard products which had been manufactured by Masonite for a few years and were still in the stage when wide public use had not been secured.

The raw material wood fiber used by Masonite in the manufacture of its hard board was obtained from wood chips as distinguished from the bagasse used by Celotex. Celotex entered the manufacture of hard board only after four separate and independent patent attorneys (i. e., Darby & Darby, of New York; Wilkinson, Huxley, Byron & Knight, of Chicago; Wm. E.
712 Seaver, of Washington, D. C., and E. A. Hampson, of Chicago) had rendered validity and infringement opinions indicating that such manufacture by Celotex would not infringe existing patents, including those of Masonite.

However, Masonite sought to enjoin The Celotex Company from manufacturing such hard panel board products, on the ground that the manufacture and processing of such products infringed the patent of Masonite, and Masonite having instituted suit for that purpose, said suit was vigorously defended by The Celotex Company until the time of its receivership, and thereafter by the Receivers acting under the direction of the District Court of the United States for the District of Delaware. The Receivers of The Celotex Company having won such patent case in the District Court for the District of Delaware on the ground of noninfringement, an appeal was prosecuted by Masonite and despite the vigorous opposition to said appeal by the Receivers of The Celotex Company, Masonite prevailed upon said appeal, and the mandate of the Circuit Court of Appeals was to the effect that such Receivers and The Celotex Company should be enjoined from manufacturing or selling such hard board products.

Up to that time The Celotex Company and its Receivers had promoted the widespread use of such hard panel products as were manufactured by it, or them, and their customers throughout the United States had become accustomed to purchasing from The Celotex Company and its Receivers in the same carlot shipments not only structural insulation, but also these hard board products. Upon the decision of the Circuit Court of
713 Appeals the Receivers of The Celotex Company were, of the opinion that they were faced not only with the complete loss of their hard board business, but with the loss of a large number of their customers unwilling to continue as customers unless they were enabled to purchase both structural insulation

and hardboard in the same carlot shipments. To meet this situation the Receivers of The Celotex Company entered into the 1933 del credere agency agreement with Masonite as the only type of arrangement which they could negotiate with Masonite Corporation for the distribution of hard board products manufactured by it. In the opinion of the Receivers and the representatives of the Receivers, including Mr. Dahlberg, Mr. Muench, and Mr. Munroe and the counsel for the Receivers, the Receivers had no other recourse inasmuch as by the decision of the Circuit Court of Appeals Masonite's patent monopoly under its patent was adjudicated with respect to the manufacture, sale, and distribution of such hard board products, and The Celotex Company and its Receivers were enjoined from engaging in such business. Despite continued research carried on by The Celotex Company and its Receivers, they had been unable to develop any product not infringing the Masonite patents which would enable them to produce an article of commerce they believed to be effectively competitive with Masonite hardboard, and the said Receivers were advised by the staff of the Research Depa tment maintained by them and their patent counsel that in the li, ht of the decision of the Circuit Court of Appeals they were then unable to visualize how hard board products competitive with Masonite hardboard products could be produced by the Receivers without infringing Masonite's patent so held to be valid and infringed.

714 The Receivers and Trustees of The Celotex Company and The Celotex Corporation during the early years during which these agreements with Masonite were in effect, were in a large measure responsible for securing the widespread use of hard board and establishing the local lumber yard and material supply dealer as the outlet for distribution of such Masonite hardboard products to the ultimate consumer. Although The Celotex Corporation was largely instrumental in establishing this dealer distribution for the hard board products of Masonite, the other del credere agents and Masonite itself have been able through the late years to increase the volume of sales initiated by them through the local lumber and material supply dealer outlets, with a gradual loss year after year to The Celotex Corporation of its percentage participation in the total of Masonite hardboard products so distributed.

Beginning in 1930, the principal units in the building supply field began to broaden the line of building materials manufactured and distributed by them in an effort to more effectively and economically supply the building trade and permit greater promotion of the use of synthetic building materials at reasonable costs. In an effort to meet this increased competition in service and ware-

housing and economy in distribution, The Celotex Corporation has gradually broadened its line to include all the items shown in Exhibit S–2 to the Stipulation of Facts, dated April 22, 1941, heretofore filed herein. Most of these products are now manufactured by The Celotex Corporation directly, or indirectly in the plants of affiliated or associated companies. In every instance where The Celotex Corporation has not been a manufac-
715 turer of the products distributed by it, the situation has proved unsatisfactory.

In the opinion of Mr. Dahlberg, Mr. Muench and Mr. Munroe there now exists and has existed at all times for many years every incentive to The Celotex Corporation to distribute, were it able so to do, hard board products of its own manufacture, and The Celotex Corporation has continuously, though as yet unsuccessfully, carried on research and experimentation in an effort to produce hard board products capable of being manufactured by it at a cost which would make the same competitive with the hardboard products manufactured by Masonite and at the same time be products so manufactured and of such a character as would not constitute an infringement of the patents owned by Masonite. Such research and experimentation has been carried on both in the laboratories and pilot plants in this country and in the hard board division of the English plant of Celotex where hard board is being produced commercially.

Following the decision of the Circuit Court of Appeals, during the pendency of the petition for rehearing, and when this was denied, during the pendency of the petition for certiorari by the Supreme Court of the United States, the employees engaged on research and development work for the Receivers of The Celotex Company, assisted by patent counsel for the Receivers, used frantic efforts to work out a process for producing a commercially satisfactory hard board product with raw materials and processes that would not conflict with the opinion handed down by the Cir-
716 cuit Court of Appeals, this court's opinion having indicated that if certain chemically cooked pulps could be used as the raw material for such board, it was probable that they did not fall under the patent.

During this period, i. e., from July 6, 1933, when the Circuit Court of Appeals reversed Judge Nields, to October 10, 1933, when the del credere agency agreement with Masonite Corporation was signed, at least 8 or 10 different possible methods of manufacture were worked out on the small scale equipment available and the most promising of them tried out on the full plant scale equipment at the mill at Marrero, which equipment produced twenty 4′ x 12′ boards at a time. The failure of this endeavor to produce a satisfactory material was because when boards were

produced that were satisfactory, using a type of material that appeared to fall without the court's decision, it was found that production costs of such material were prohibitive and that when board was produced at a cost that indicated such manufacture might be competitive, the quality of the board itself was such as to render it useless for the purpose. The Receivers for The Celotex Company deemed it necessary for these reasons to sign the 1933 agreement referred to above. However, the operating and research personnel of the company both during the remainder of the receivership and thereafter on the formation of The Celotex Corporation have continued active endeavors to work out a method of producing such a material. It has continued to be the policy of the company to again engage in the manufacture of such products when and if it could do so without conflicting with the Masonite patent structure and with the production of a
717 satisfactory type of material competitive with Masonite hardboard products. In line with such policy the company has not only followed up methods of manufacture for such products which it has developed itself but has followed up various processes which had been brought to its attention by others either in the United States or certain foreign countries.

As indicative of this situation Mr. Munroe and the members of the Research Department have examined not less than a dozen rather exhaustive and voluminous patent reports rendered by several different outstanding patent attorneys engaged by the Receivers or The Celotex Corporation from time to time during the period from July 1933, when the Circuit Court of Appeals reversed Judge Nields, until the middle or latter part of 1937, when Mr. Munroe became engaged on other matters. These reports comprise a study of the opinion of the Circuit Court of Appeals and what possible processes or materials might be used or, in certain instances, what particular material or process might be used by Celotex in such manufacture without infringing Masonite's patents.

A cursory examination of the records of the Research Department of the Celotex Corporation indicates that such reports were rendered by Mr. Huxley of Wilkinson, Huxley, Byron & Knight of Chicago on July 7, 1933, February 6, 1934, November 3, 1934, January 7, 1935, and October 3, 1935, and similar types of reports were rendered, among others, by Mr. Darby of New York and Mr. Hampson, patent attorney for the company.

As indicative of the experimental work conducted in line with the above, there is attached, marked Exhibit CEL III, and
718 made a part hereof, a report of March 29, 1934, from Mr. C. A. Muench, Vice President at Marrero, to Mr. Munroe, covering experimental and production work on the type of hard

board product Celotex then thought might be manufactured as well as a two-page letter of August 2, 1934, from Mr. F. A. Irvine, who had charge of the Research Laboratories at Marrero, to Mr. Munroe covering another type of product.

The company records disclose that similar reports were rendered by the Research Laboratory at Marrero to the Chicago office throughout the years 1935 and 1936, and that Celotex had active negotiations extending from July 1934 until March or April 1936, with Farley & Loetscher Manufacturing Company of Dubuque, Iowa, who had, in connection with their manufacture of sash and doors, developed a hard board type of material using a binder, and which material appeared to fall without the Masonite patent structure. This activity included negotiating a contract with Farley & Loetscher for the use of its process, several visits by representatives of The Celotex Corporation, including Mr. Munroe, to their plant at Dubuque, Iowa, many visits by Mr. E. C. Loetscher, Superintendent of Farley & Loetscher, to the Celotex offices in Chicago, and by the production by Farley & Loetscher on their equipment at Dubuque of a considerable number of samples taken from full-sized boards and submitted to us for our examination. This activity with Farley & Loetscher terminated in the spring of 1936 because it appeared to Celotex that the cost of production of such material rendered it noncompetitive with Masonite's hardboard product.

When Mr. Munroe was in England in the fall of 1937 and
719 the spring of 1938, in connection with the building of the present Celotex plant in London for the production of insulation and hard boards, he investigated a process there which had been called to his attention by the Chicago office of Celotex.

Prior to, during and since receivership Celotex has had meetings from time to time of a Joint Operating Committee composed of the top personnel of its various departments, both in Chicago and from its plant or plants, for the discussion of various company problems, which problems were covered by dockets. The file of that Committee covering the particular docket of hard board manufacture contain certain entries which indicate the activities of Celotex in connection with the possible manufacture of hard board by Celotex since the signing of the October 1933 agreement with Masonite. These entries show that at meetings of the Committee held on November 17 and 18, 1933, various products were submitted on which the Operating Department had been working. A sub-committee was appointed to go over the situation and to report thereon with the view of thereafter having Mr. Huxley review their conclusions from the patent angle. This record shows that this matter was thereafter discussed at a meeting held in January 1934, one in March 1934, again in July 1934, again in September

1934, and again in October 1934. At a meeting held in December 1934, there was also brought up for discussion the Farley & Loetscher development referred to above. Further meetings of this Joint Operating Committee were held in March 1935, in May and in June. In July 1935, this Committee decided to recommend to
the Trustees of The Celotex Company that they notify
720 Masonite of their intention to manufacture a new hard board, as it was believed that the Research Department had worked out a process which would not conflict with the opinion of the Circuit Court of Appeals. There is no record, however, that the Trustees did so notify Masonite. Meetings of this Committee were also held in July, August, and November of 1935, at certain of which meetings this process was further discussed in some detail and further considered, and meetings were again held in March, May, June, and November of 1936, and January and March of 1937, at which the matter was further discussed. It was finally concluded that there were grave doubts whether this new process could be utilized without infringing Masonite's patent and that there was serious doubt whether the resultant product could be produced and sold at a price even reasonably competitive with Masonite.

Since 1938 the Research Department of the company in Marrero, La., has continued to carry on additional research and experimentation in connection with the manufacture of hard board products, both for the purpose of developing an acceptable product without the scope of the Masonite patent, and for the purpose of securing improvements in the manufacture of hard board to be utilized by The Celotex Corporation upon the expiration of such Masonite patent in 1945. During such period negotiations were carried on to acquire patent rights claimed to avoid the claims of Masonite's patents but these patent rights were determined by patent counsel to be of no value and such claims unfounded.

At the English plant of The Celotex Corporation, where
721 hard board has continuously been manufactured since the spring of 1938 and sold in countries where the sale would not infringe Masonite's foreign patents, research has been carried on for improvements in methods and process of manufacture and the results of experimental work done there has been made available to the Research Department of The Celotex Corporation in America.

Since the execution of the 1933 agreements with Masonite, the Receivers and Trustees of The Celotex Company during the time that they were in charge of the business of the old Celotex Company, and since September 30, 1935, the date when The Celotex Corporation accepted said assignments of said agreements, The Celotex Corporation, have been desirous of engaging in the busi-

ness of manufacturing their own hard board products and distributing the same as products of their own manufacture. It is the policy and intention of The Celotex Corporation to continue active development and research and experimental work in an effort to produce satisfactory hard board products fully competitive with the Masonite Hardboard and it is the intention of The Celotex Company to cancel its existing agreement with the Masonite Corporation prior to 1945, in the event that prior to that time it is able to find a way to manufacture hard board products without the scope of the Masonite patent adjudicated to be valid and to be infringed by Celotex, competitive as to quality and cost of manufacture. In any event it is the intention of The Celotex Corporation to engage in the business of manufacture of its own hard board products and to distribute such products as products of its own manufacture in active competition with
722 the Masonite Corporation after 1945, the date of the expiration of said Masonite patent so adjudicated to be valid and to be infringed by Celotex in said patent suit between Masonite and Celotex. The continuance of the relationship between Masonite and The Celotex Corporation, as provided by said del credere agreements, was prompted by the necessity of The Celotex Corporation continuing such arrangements in order to be afforded a source of supply of hard board with which to satisfy the needs and demands of the customers which it has served for many years, as hereinbefore set forth.

For some time the plants of The Celotex Corporation have been operating on a twenty-four-hour-a-day basis and in excess of their rated capacity in an effort to supply materials required in the national defense program, and The Celotex Corporation has had to curtail supplying the requirements of certain of its regular customers. The Celotex Corporation does not now have facilities capable of manufacturing hard board products were it free from the limitations of the injunction which prevents it from engaging in such manufacture. The construction of its plants and facilities to manufacture hard board products, could the defendant legally engage in such manufacture, would require the expenditure of large sums and in view of the present shortage of materials and manufacturing facilities to supply the machinery required, would entail a delay of some two to three years before the construction of such plant and the installation of necessary machinery could be completed.

723 In the efforts of The Celotex Corporation to negotiate the arrangements with Masonite as embodied in the agreements heretofore in force and as now embodied in the new 1941 agreement, such of the foregoing circumstances as existed at the time, as above related, were taken into account. The existing

arrangement represents the only arrangement which The Celotex Corporation and its predecessors have been able to work out with Masonite or which they have any hope of being able to work out with it prior to 1945 in view of its patent and the inability of Celotex to find a way to manufacture outside the scope of such patent. It represents the results of a sincere and honest effort to insure that The Celotex Corporation may continue to supply its customers.

The Celotex Corporation is advised by patent counsel that Masonite as the holder of United States Letters Patent, duly adjudicated as valid as aforesaid, covering the process of manufacturing hard board, and the product itself, has the exclusive right to manufacture, use, and sell hard board and the right to prevent others from exercising like privileges without its consent.

7. The Receivers of The Celotex Company did not enter into the agreement with Masonite dated October 10, 1933, and The Celotex Corporation did not enter into the agreements with Masonite dated October 29, 1936, or March 20, 1941, or either of them, with any intent whatsoever to join in any unlawful combination or conspiracy or to permit Masonite to monopolize the manufacture or sale of hard board or to join in any combination, conspiracy, or agreement in restraint of trade.

724 Neither The Celotex Corporation, nor any representative of The Celotex Corporation, nor any representative of the Receivers or Trustees of The Celotex Company, ever suggested or requested the insertion in any of said agreements of any provision for the fixing of prices or the limiting of the class of customers to whom hard board might be sold. No representative of The Celotex Corporation, nor of the Receivers or Trustees of The Celotex Company, ever conferred with any representative of Masonite as to the particular prices to be charged by Masonite or any agent of Masonite under the then existing agreement between Masonite and such agents and no representative of Masonite has ever asked the advice or consent of any representative of The Celotex Corporation, or of the Receivers or Trustees of The Celotex Company, with reference to what would be a proper price as at any time for any hardboard product of Masonite.

With the exception of said 1941 agreement, there is no agreement, understanding, or arrangement, express or implied, written or oral, of any nature whatsoever between Masonite Corporation and The Celotex Corporation with respect to the manufacture or distribution of hard board or related or competing products or any other product manufactured or distributed by Masonite Corporation or by The Celotex Corporation. The Celotex Cor-

poration is advised, however, that whether the 1941 agreement does or does not expressly require that Masonite shall itself sell in accordance with its published catalogs and price lists, the fact is that it is the settled and determined policy and intention of Masonite at all times to adhere to the prices set forth in
725 its published catalogs and price lists. It is the intention of The Celotex Corporation to observe fully and completely and in the utmost good faith all of the terms, conditions, and provisions of said agreement dated March 20, 1941, as therein stated, and it has no intention at any future time of reinstating any pre-existing agreement cancelled and terminated by said agreement dated March 20, 1941.

(Exhibits CEL II and CEL III attached to stipulation.)

It is further stipulated between defendant The Celotex Corporation and the plaintiff in this action, subject to the same reservations accompanying the Stipulation of Facts heretofore made under date of April 22, 1941, as follows:

On February 8, 1935, the District Court of the United States for the District of Delaware (Hon. John P. Nields, sole judge of said court presiding) entered an order upon a creditor's petition seeking reorganization of The Celotex Company under the provisions of Section 77–B of the Bankruptcy Act as amended, filed in said court in the cause instituted in said court entitled "In the Matter of the Celotex Company, Debtor, in Proceedings for Reorganization under Section 77–B of the Bankruptcy Act, No. 1080," and upon the answers filed to said Petition, determining that such petition complied with said Section 77–B and had been filed in good faith and approving said petition as properly filed under Section 77–B of the Bankruptcy Act, as amended.

On the same day (February 8, 1935) said District Court
726 of Delaware appointed Colin C. Bell of Wilmington, Delaware, and William Tracy Aiden, of Chicago, Temporary Trustees of the estate of the said The Celotex Company, Debtor in said cause, and ordered, among other things, the following:

"(4) * * * said trustees shall have all the title and shall exercise, subject to the control of this Court and consistently with the provisions of said Section 77B, all the powers of trustees appointed pursuant to Section 44 of the Bankruptcy Act of 1898 as amended, and shall have in addition the same powers as those exercised by receivers in equity to the extent consistent with said Section 77B, including the power to operate the business of the Debtor until this Court shall otherwise prescribe; and to this end the Trustees are hereby expressly vested, without limiting the generality of the foregoing, with all the rights, powers, and authority not inconsistent with said Section 77B heretofore granted by the United States District Court for the District of

Delaware to the Receivers for the defendant in the said equity proceeding entitled 'MacManus, Inc., a Michigan corporation, vs. The Celotex Company, in Equity No. 961,' and by the United States District Court for the Northern District of Illinois, Eastern Division, and by the United States District Court for the District of Louisiana, New Orleans Division, to Ancillary Receivers appointed by said Courts in proceedings ancillary to the last named equity proceeding.

"(5) All persons, firms, associations, trusts, and corporations are hereby directed forthwith to turn over all assets, including books of account, contracts, deeds, accounts, and other
727 papers and property of whatsoever nature and wheresoever located belonging to the Debtor's estate and in their possession or control, to the Trustees or their representatives designated for the purpose, to be dealt with by the Trustees as is herein, or may hereafter by this Court be directed, and the Trustees are hereby directed to take such steps as they deem necessary to acquire possession and control of any of such assets as may be held by said Receivers and Ancillary Receivers, provided that the Trustees may in the exercise of their judgment allow any of the same to remain in their present places and custody subject to the order and direction of the Trustees; and the Trustees shall pay out of any funds available or from time to time becoming available, such reasonable administrative expenses and allowances granted in the said equity proceeding and ancillary proceedings as this court shall hereafter approve. The Trustees are hereby authorized to continue the books of account of the Receivers and Ancillary Receivers with the same effect as if the Trustees had opened new books of account as of the opening of business on the day on which the bond mentioned in paragraph (6) hereof is filed, all operations beginning with the opening of business on such date being deemed to be for account of the Trustees.

* * * * *

"(7) Upon filing the bond above provided for, the Trustees shall, except as hereinafter in paragraph (8) provided, be deemed to have asumed in their capacities as such Trustees and not otherwise, any and all contracts, commitments and obligations of said Receivers and Ancillary Receivers theretofore made
728 and be substituted in all respects for said Receivers and Ancillary Receivers in respect of the rights and liabilities arising out of any and all such contracts, commitments and obligations; and in particular, and without limiting the generality of the foregoing, all persons, firms, associations, trusts and corporations who shall or may be required by any general or special orders or instruction signed or given by the primary or Ancillary Receivers referred to herein, or by either of them, or

by any duly authorized person or persons in the names and on behalf of them, or any of them, prior to the filing of said bond including, but without limiting the generality of the foregoing, orders or directions respecting checks, notes, bills of exchange or other orders for the payment of money, bills of lading, bonds, specialties, contracts and similar instruments, shall be fully protected in carrying out and performing such orders and instructions to the same extent as though such orders or instructions had been given by the Trustees herein."

A true copy of said order is submitted as Exhibit S–16 to the Stipulation of Facts, dated April 22, 1941, heretofore filed herein.

Said Trustees duly qualified as such in the manner provided by said order and the provisions of Section 77–B of the Bankruptcy Act, as amended.

On February 14, 1935, said District Court of Delaware entered a further order in said bankruptcy cause which provided, among other things, the following:

"The Trustees shall have and are hereby authorized to
729 exercise all powers necessary to the adequate and proper administration, preservation, maintenance and operation of the properties, assets and business of the Debtor * * *; to conduct and operate the business of Debtor as said business has been conducted heretofore by said Receivers and Ancillary Receivers; * * * to perform existing contracts of the debtor and of the Receivers and Ancillary Receivers; * * *.

Thereafter on March 1, 1935, said District Court at a hearing before said court held after due notice thereof had been given as provided by Section 77–B of the Bankruptcy Act, entered an order making permanent the appointment of said Trustees. Said Trustees duly complied with the terms of said order with respect to qualification by extending the bond, etc. Said order of March 1, 1935, provided, among other things, the following:

"(2) The order herein dated February 8, 1935, temporarily appointing Trustees; the order herein dated February 14, 1935, regarding payment of Receivers' obligations, insurance, offices, franchises, transfer of stocks, attorneys, accountants, operations and notices; the order of February 14, 1935, regarding bank accounts; and the supplemental order of March 1, 1935, regarding bank accounts; are hereby continued in full force and effect as hereby supplemented and modified; and the Trustees are hereby authorized to exercise all powers necessary to the adequate and proper administration, preservation, maintenance and operation of the properties, assets and business of the Debtor's estate, all as provided in said orders.

730 "(3) The Trustees are hereby authorized to continue the

books of account of the Receivers and Ancillary Receivers of The Celotex Company with the same effect as though the Trustees had opened new books of account as of the opening of business on February 13, 1935; and all operations performed after the opening of business on said date shall be deemed to be for account of the Trustees.

"(4) Except as otherwise specifically provided in Section 77B of the Bankruptcy Act, notice of subsequent proceedings herein, other than proceedings arising in the ordinary course of the administration, preservation, maintenance and operation of the properties, assets and business of the Debtor's estate, shall be given to counsel for the Debtor, the Trustees and such other persons as have been granted or shall hereafter obtain leave to intervene in these proceedings."

A true copy of said order is submitted as Exhibit S–17 to the Stipulation of Facts, dated April 22, 1941, heretofore filed herein.

From the date of their appointment said Trustees, acting under the provisions of the foregoing order, assumed said contract of the Receivers with The Masonite Corporation dated October 10, 1933, and the obligations of the Receivers thereunder and became substituted in all respects for said Receivers and Ancillary Receivers thereunder, and said Trustees carried out the terms and provisions thereof and distributed the hardboard products of Masonite under the terms thereof until September 30, 1935, when such Trustees ceased to act as such, as hereinafter set forth.

731 Said contract of the Receivers with Masonite dated October 10, 1933, and so assumed by said Trustees under said order aforesaid, was never rejected, canceled, or disaffirmed by said Receivers or by said Trustees but was continued in effect.

The decree of confirmation of the District Court of the United States for the District of Delaware, dated September 30, 1935 (Exhibit S–25 of the Stipulation of Facts, dated pril 22, 1941, filed in this cause) provided by paragraph 5 thereof, among other things, as follows:

"The New Company [1] however * * * (b) shall assume and perform all executory contracts and agreements properly entered into by said Recievers and said Trustees in respect of the operation of the Debtor's business, * * *."

Pursuant to such decree of confirmation the Trustees by their indenture dated October 31, 1935 (a copy of which is submitted herewith, marked Exhibit CEL I, and made a part hereof) conveyed, assigned and transferred to the New Company (The Celotex Corporation, defendant herein) all the assets and properties,

[1] NOTE.—Said decree of confirmation designated The Celotex Corporation as the "New Company" referred to in such order.

tangible and intangible, of every kind and description, included in the estate of The Celotex Company, Debtor, in said bankruptcy proceedings, and/or belonging to said Trustees and said The Celotex Corporation as such assignee, and in compliance with the terms of such decree of confirmation which directed it so to do, agreed as follows:

732 "6. The New Company, for itself, its successors and assigns, hereby assumes all contracts of the Old Company which at the date hereof are executory in whole or in part, including unexpired leases, and which have not been rejected or disaffirmed by the Trustees in the Reorganization Proceeding or by the Receivers in the receivership proceedings of the Old Company, and all contracts, liabilities and obligations of the Trustees and of said Receivers which have not been satisfied, discharged or fulfilled and such contracts, liabilities and obligations shall continue as contracts, liabilities and obligations of the New Company. The New Company will defend any and all claims against the Old Company filed in the Reorganization Proceedings and not finally determined at the date hereof and will satisfy in the manner provided in the Plan all such claims as finally allowed."

Pursuant to such transfer and assignment and such assumption provided by such indenture, The Celotex Corporation continued the distribution of Masonite "hardboard" in the same manner as the Receivers and the Trustees pursuant to the provisions of said 1933 agreement.

(Exhibit CEL I attached.)

Mr. LAMB. If the Court please, on behalf of the defendant Armstrong Cork Company, we also have a written stipulation made with counsel for the plaintiff which we ask be made a part of the record.

Stipulation (Armstrong Cork Company)

It is hereby stipulated by and between the attorneys for the plaintiff and the attorneys for the defendant Armstrong
733 Cork Company, subject to the right of either the plaintiff or said defendant to make objection thereto on the grounds of relevancy or materiality, that if Mr. H. W. Prentis, Jr., Mr. Gerald C. Denebrink and Mr. H. R. Peck were called as witnesses, they would testify as follows:

1. Mr. H. W. Prentis, Jr. is the President of Armstrong Cork Company and has held such office since the year 1934.

2. Prior to becoming President he was for many years a Vice President of said company.

3. As President he is the chief executive officer of Armstrong Cork Company and performs the usual functions and has the

usual responsibilities of the executive officer occupying such position.

4. Under date of December 1, 1933 Armstrong Cork Company, through its subsidiary, Armstrong-Newport Company, entered into an agreement with the defendant Masonite Corporation which authorized said subsidiary to sell Masonite hardboard products to the lumber dealer trade upon commission paid by Masonite Corporation and upon the terms and provisions of said written agreement. That agreement was negotiated by or under the supervision of Mr. Hugh McC. Clarke, a Vice President of Armstrong Cork Company and of Armstrong-Newport Company, and was signed by Mr. Clarke on behalf of Armstrong-Newport Company. Mr. Clarke died in 1938.

5. Said subsidiary Armstrong-Newport Company was dissolved in 1938 and its assets and business were conveyed to Arm-
734 strong Cork Company. Said former subsidiary, dissolved in 1938, entered into the 1933 agreement with Masonite Corporation to handle the latter's hardboard products under the following circumstances:

6. As early as the year 1920 and prior thereto Armstrong Cork Company was engaged in the manufacture and sale of corkboard insulation which, among other things, was used in the manufacture of refrigerators. Shortly after 1920 the manufacture of automatic refrigerators increased substantially, creating a large demand for Armstrong corkboard insulation, and the company was doing a very large volume of business in that product.

7. In about the year 1928 there came into the market a fibreboard product which could be used for refrigerator insulation as effectively as corkboard insulation and could be sold at much lower prices. There resulted a substantial decline in the demand for Armstrong corkboard for refrigerator insulation purposes.

8. It became apparent, therefore, that if the Armstrong Company was to hold its position in the refrigerator insulation field it must develop a fibreboard insulating material.

9. At that time, as now, Armstrong was and is one of the largest manufacturers of linoleum in this country and in connection with such manufacture consumes large quantities of rosin substances, the raw material for which is extracted from pine trees grown in the South.

10. In the years 1932 and 1933 and thereafter down to the
735 present rosin material was and is manufactured and sold in large quantities by a company called Newport Industries, Inc., which had and now has its manufacturing plant at Pensacola, Florida. Such rosin material it extracted from southern pine trees. In the extraction process there is left spent pine chips as a residue.

11. Armstrong Cork Company was in 1931 and now is the largest customer of Newport Industries, Inc. for rosin products.

12. In carrying on its research and experiments to determine a material which could be used in the manufacture of fibreboard insulation, Armstrong discovered that the spent pine chips remaining after the pine oil and rosin is extracted provided an excellent raw material for making fibreboard and which was and is obtainable in large quantities at low cost.

13. In 1930 and thereafter Newport Industries, Inc. had developed no use for the spent pine chips other than as a fuel, which was used under the boilers in its Pensacola plant.

14. Realizing that those chips could be used as a raw material in the manufacture of fibreboard insulation, Armstrong made a proposal to Newport Industries, Inc. in 1928 that a new company be organized, to be called Armstrong-Newport Company, the capital to be contributed, one-half by Armstrong Cork Company and one-half by Newport Industries, Inc., and which would build a plant to manufacture insulation board near the existing rosin plant at Pensacola, Florida.

736. 15. Such a plan was carried out and during the year 1930 a plant was constructed adjoining the premises of the rosin plant at Pensacola, Florida.

16. The product of the new plant came on the market during the year 1931.

17. However, at about the time that Armstrong-Newport Company had placed its plant in production there was developed by the glass industry a spun glass insulating material which was also adaptable for use for insulation purposes in the manufacture of refrigerators. That new glass material provided a very formidable competition for Armstrong's new fibreboard insulation.

18. In addition, as is well known, in 1931 occurred a severe business decline and the demand for insulation material for refrigerator purposes fell off rapidly.

19. In order that the investment in the new plant at Pensacola should be turned to a profitable use it was determined that the fibreboard insulation be offered in the market to the building industry as a material for building purposes.

20. However, when this change was made the depression was at its depth, and it was soon recognized that the Armstrong sales organization was greatly handicapped in the lumber dealer and building trades industries by having a single product to offer.

737 21. At that time the building materials division of the Armstrong Cork Company was under the direction of the late Hugh McC. Clarke, a Vice President of the company, and who, as stated, died in August 1938.

22. The Armstrong fibreboard was designated by the trademark "Temlok." The general manager of the "Temlok" dealers sales division during the period from April 1931 to June 1932 was Mr. Gerald C. Denebrink.

23. The "Temlok" board was usable for sheathing, as a plaster base, as an interior finish and for general building purposes. However, the fibre used in its manufacture was of short length and it did not have the tensile strength of competing insulation boards.

24. The company's "Temlok" division gave consideration to the desirability of adding a hardboard line of products to the insulation or fibreboard line. At that time there were being offered in the market a hard board manufactured by the Celotex Company and the Masonite hardboard manufactured by Masonite Corporation. After investigation, Armstrong Cork Company came to the conclusion that the Masonite hardboard was a superior product and in 1931 Armstrong endeavored to obtain from Masonite the terms under which Masonite would license Armstrong to manufacture hardboard under the Masonite patents.

25. Armstrong Cork Company was primarily engaged in manufacturing. The company executives were of the
738 opinion that by making additions to the existing plant at Pensacola it would be possible to add facilities at that plant for the manufacture of Masonite hardboard. Discussions were had by Armstrong representatives with representatives of Masonite Corporation looking to the making of a license to manufacture, but due to the fact that there was then pending a patent infringement suit between Masonite Corporation and the Celotex Company it was not possible to fix the terms of a manufacturing license. In January 1932 Armstrong was notified by Masonite Corporation that Masonite preferred not to issue any license to manufacture, at least for the present.

26. Masonite Corporation, as a manufacturer of fibreboard, was a member of the Fibreboard Insulation Institute. Armstrong was also a member. During the year 1933, Armstrong learned that the Masonite patents had been upheld and that Celotex had infringed the Masonite patents. Armstrong also learned that a selling agency agreement had been entered into between Masonite Corporation and Celotex. It was further learned that the Masonite Corporation would be willing to enter into a similar selling agency agreement with other companies who, like Armstrong, had a large national selling organization and were marketing products on a nation-wide basis.

27. In due course the agency agreement dated December 1, 1933 between Masonite Corporation and Armstrong-Newport Company was entered into.

28. When Armstrong, through its subsidiary, entered into the 1933 agreement it did so with the same object in mind that
739 it had in 1931, namely, to be able to offer Masonite hardboard products to Armstrong's lumber dealer customers to whom it was then offering its fibreboard insulation.

29. Although Mr. Prentis did not personally handle the negotiations for the 1933 agreement, Mr. Clarke and his subordinates reported to him concerning the matter, and Mr. Prentis is confident that there were no understandings or agreements of any kind, other than as set forth in the written agreement itself.

30. So far as the Armstrong Company or its subsidiary, Armstrong-Newport Company, was concerned, the making of the 1933 agreement was entirely independent of, and had no relation to, the making of other similar agreements between Masonite Corporation and Celotex or between Masonite Corporation and any other persons, firms or corporations. As stated, as early as 1931 Armstrong had determined that it wanted to be in a position to sell the Masonite hardboard, and being unable to obtain a manufacturing license at that time, it accomplished as best it could the same purpose and object in making the 1933 agency agreement.

31. During the entire period that Armstrong or its said subsidiary sold Masonite hardboard products under the 1933 agreement Mr. Prentis and Mr. Peck, the present Vice President in charge of sales of Masonite hardboard, are confident that there were no discussions between Armstrong or any of its officers or representatives with Masonite Corporation or its officers or representatives or with any other persons, as officers or
740 representatives of any other person, firm or corporation, to fix the prices at which Masonite hardboard products should be sold by Masonite Corporation or by Armstrong or by any other persons, firm or corporation.

32. Prior to making the agreement dated December 1, 1933, so far as can now be recalled by any living officer or representative of Armstrong, there were no discussions between representatives of Armstrong and representatives of the Masonite Corporation of the question whether Masonite Corporation would sell its hardboard products through its own selling organization at the same prices which Armstrong was authorized to sell Masonite hardboard products under the provisions of the 1933 agreement. At all times the Armstrong representatives understood that Masonite Corporation would not sell hardboard products through its own selling organization at prices below the prices which Armstrong was authorized to sell Masonite hardboard products. In practice it has been the observation of Armstrong's representatives that the prices at which the Masonite Corpora-

tion has sold its hardboard products through its own selling organization have been the same as the prices at which Armstrong has been authorized to sell Masonite hardboard products.

33. All during the time that the 1933 agreement was in effect Armstrong's relations with Masonite Corporation were harmonious, with the possible exception that during the year 1935 a dispute arose regarding the right of Masonite Corporation to terminate the agreement. According to Masonite's interpre-
tation, the Armstrong-Newport Company had not
741 sold, as agent, for Masonite Corporation the minimum quantity required to be sold in a six months' period, as provided in the agreement. However, through an exchange of telegrams and letters it was agreed that the provisions of the 1933 agreement should be continued in effect, pending the preparation of a new agreement.

34. In 1936 Masonite Corporation informed Armstrong that it had decided that it would be desirable to have a new form of agreement to take the place of the 1933 agreement, the provisions of which would be stated in greater detail than as stated in the 1933 agreement, to eliminate possible misunderstandings.

35. In October of 1936 a new agreement and supplement was made between Armstrong and the Masonite Corporation. The negotiations and discussions in connection with that agreement were handled on behalf of Armstrong by its Vice President, Mr. H. R. Peck, who signed the agreement on behalf of Armstrong's subsidiary, Armstrong-Newport Company.

36. During the year 1931 and while Armstrong was carrying on its research in connection with the production of fibreboard insulation its research department developed a type of hardboard product which could be manufactured with the use of a varnish binder. Employees of Armstrong's research department obtained a patent on such product and the patent was assigned to Armstrong Cork Company. The patent is No. 1,809,316 and is dated
June 9, 1931. Based upon Armstrong's studies no com-
742 mercial product of the hard board covered by its said patent was ever manufactured, because in the opinion of Armstrong's executives the cost of manufacture would be so great that the product could not be marketed in competition with the hardboard products manufactured by Masonite under its patents and sold by the Masonite Corporation.

37. During the year 1938 Armstrong Cork Company again gave consideration to the matter of manufacturing Masonite hardboard under the Masonite patents. Extensive studies were made regarding the cost of a manufacturing plant and its operation. In this connection Masonite Corporation permitted the Armstrong representatives to examine its manufacturing plant and

furnished certain information regarding costs of manufacture. As a result of these studies it was again concluded that it would not be possible with the small volume which the Armstrong Company could reasonably expect to produce and market to manufacture Masonite hardboard as cheaply as Masonite Corporation was manufacturing it, taking into consideration every item of cost, including the cost of a manufacturing license and the royalties which would be payable thereunder, and as a matter of business judgment, therefore, it was determined not to obtain a manufacturing license from the Masonite Corporation.

38. During the period while the 1933 and the 1936 agency agreements were in effect, Masonite hardboard products consigned to Armstrong warehouses were physically segregated so that they could always be identified as the property of Masonite Corporation, but no separate signs were placed upon the
743 consigned Masonite hardboard to indicate ownership by Masonite Corporation.

39. In its advertising generally Armstrong Cork Company did not specifically mention that Masonite hardboard which it sold as agent for Masonite Corporation was the product of Masonite Corporation, but the salesmen employed by Armstrong frequently pointed out to prospective buyers that the hardboard which they were offering for sale was manufactured by Masonite Corporation. In 1933, after the 1933 agreement between the Masonite Corporation and Armstrong had been entered into, Armstrong salesmen calling on the lumber dealer trade offered the hardboard products manufactured by the Masonite Corporation under the trade-marks "Temboard," "Temboard De Luxe," "Temwood," "Tempered Temwood" and "Blocked Temwood." In some of Armstrong's price lists describing "Temwood" and "Temboard" reference was made to the fact that the sale of such hardboard products by Armstrong was pursuant to an "agreement" with the "Masonite Corporation." For example, under Armstrong's price list No. 209 for "Temwood" and "Temboard" shorts for sale and shipment to industrial buyers for use only as a raw material in fabricating resale units and effective April 1, 1937, there was a note which read as follows:

"Note—Under our License Agreement with the Masonite Corporation, we are unable to cut or fabricate industrial shorts. Shipments can therefore be made only in the sizes shown above. Larger sizes than listed are sold only through Lumber Dealers."

744 40. During the period while the 1933 and 1936 agreements were in effect between Armstrong Cork Company or its subsidiary and the Masonite Corporation, Armstrong carried general insurance applicable to consigned stocks of Masonite

hardboard stored in warehouses of the Armstrong Company which, among other things, covered:

"* * * goods, wares and merchandise incidental to the business of the assured including packages for and/or containing the same, to include store, office and warehouse furniture and fixtures and machinery incidental to stores and warehouses; the property of the assured, or held in trust, or on consignment, or for which the assured may be liable in the event of loss or damage, all while contained in any building, shed or structure or within 100 feet thereof, within the limits of The United States of America."

41. Furthermore, the Armstrong Company carried insurance policies which were applicable to Masonite hardboard on consignment and stored at the Armstrong factories, which contained a provision as follows:

"If this Policy covers personal property owned by the assured, it shall also cover while in the custody of the assured and in the same location as the property herein insured: (1) similar property of others which the assured is under obligation to keep insured; and (2) the interest of the assured in and legal liability for similar property belonging to others; loss, if any, to be adjusted with and payable to the assured name in this Policy."

745 42. Therefore, both types of insurance policies carried by the Armstrong Company covered property of the Masonite Corporation held in trust by or on consignment with Armstrong or which Armstrong was under obligation to keep insured for the Masonite Corporation, but which belonged to the latter, although the name of the Masonite Corporation was not specifically mentioned in the insurance policies themselves.

43. In selling Masonite hardboard products as an agent for the Masonite Corporation, Armstrong has always sold at the prices designated by Masonite Corporation. Armstrong has never attempted to impose upon the buyer of Masonite hardboard any agreement or understanding regarding the resale price thereof. At no time while the 1933 and 1936 agency agreements were in force did Armstrong Cork Company or any of its executives or representatives have any discussion whatsoever with either Masonite Corporation or its representatives or with any other agents of Masonite Corporation or their representatives regarding any particular prices at which Masonite hardboard products should be sold.

44. So far as the Armstrong Company is concerned, there has never been any intent or desire for concerted action of any character whatsoever in connection with the sale of Masonite hardboard or the prices at which it would be sold.

45. In the normal course of business, Mr. Prentis, through reports from the late Mr. Clarke, Mr. Peck and other em-
746 ployees of Armstrong acting under their direction, would have had knowledge of the existence or nonexistence of any agreement on the part of Armstrong with Masonite Corporation or of any agreement on the part of Armstrong with any other persons, firms, or corporations who had entered into or were considering entering into agreements with Masonite Corporation for the handling of Masonite hardboard products, if such agreement or agreements contained provisions which either restricted the persons, firms, or corporations who might have the opportunity of selling Masonite hardboard or fixed the prices at which Masonite hardboard products would or would not be sold.

46. Except that it is conceded that Armstrong entered into agreements with the Masonite Corporation dated December 1, 1933, October 29, 1936, and as of March 20, 1941, so far as Mr. Prentis and Mr. Peck know there has never been any agreement or understanding on the part of the Armstrong Company or its subsidiary with Masonite Corporation or with any other persons, firms, or corporations, or any agreement or understanding on the part of Masonite Corporation with other persons, firms, or corporations the purpose or effect of which was or is to restrict the persons, firms, or corporations who would have the privilege of selling Masonite hardboard products or to fix the price or prices at which Masonite hardboard products would or would not be sold.

47. The entire agreement between Armstrong, or its subsidiary Armstrong-Newport Company, and the Masonite Corporation relating to the sale of Masonite hardboard products (excluding Masonite hardboard which is purchased by Armstrong for
747 fabricating or processing into Armstrong's "Monowall" products) was set forth in the said agreements dated December 1, 1933 and October 29, 1936 and the supplements thereto.

48. As of March 20, 1941 Armstrong Cork Company entered into a new "Appointment of Agent" agreement with Masonite Corporation, a copy of which is attached to the supplemental answer of the defendant Armstrong Cork Company.

49. In entering into the new agreement as of March 20, 1941 the object of Armstrong was the same as it was when it first sought a manufacturing license from the Masonite Corporation in 1931, that is, to be in a position to offer Masonite hardboard products to the lumber dealer trade as a supplement to Armstrong's own fibreboard products. Armstrong was advised to enter into the 1941 agreement because of the pendency of this action and the belief that certain provisions of the 1936 agreement

were considered by representatives of the government as inconsistent with a relationship of principal and agent between the Masonite Corporation and the Armstrong Company. Armstrong is informed that before entering into the 1941 agreement a proposed copy of the agreement was submitted to the Department of Justice by counsel for Armstrong, who stated to the attorneys for the government that Armstrong intended to enter into an agreement with the Masonite Corporation in the form as presented to the attorneys for the government. The new "appointment of agent" agreement was actually signed on behalf of Armstrong Cork Company April 2, 1941, to be effective as of March 20, 1941,
748 and to continue for the period ending March 20, 1945, but subject to the right of cancellation on the part of Armstrong and of Masonite Corporation, as in said agreement provided.

Dated April 30, 1941.

(Signed) HUGH B. COX,
Attorneys for Plaintiff.

(Signed) HORACE R. LAMB,
Attorneys for Defendant Armstrong Cork Company.

Mr. Cox. I will, at the same time, now offer the annual reports of the Armstrong Cork Company for 1938 to 1940, inclusive.

(Marked "Government's Exhibit 31.")

Mr. Cox. Mr. Dallstream, do I now understand that all of the orders in the receivership and bankruptcy proceedings of the Celotex Company have now been put in the record so far as they relate directly to the execution of the agreement with Masonite?

Mr. DALLSTREAM. Well, those files are very voluminous, and I haven't had a chance to go to Delaware to look them over, but from what information I have been able to gather from other counsel in trying to assemble these things, they represent my best effort to get them. So far as I know it covers——

Mr. Cox. So far as you know they are all in?

Mr. DALLSTREAM. With respect to the dealings on these particular contracts. You understand by that we haven't offered
749 any current reports of the receiver's account of hardboard sold, or any of those things.

Mr. Cox. I am thinking only of the court orders.

Mr. DALLSTREAM. That is right.

Mr. Cox. I am now offering the annual reports of Certain-teed Products Corporation for the years ending December 31, 1938, December 31, 1939, and December 31, 1940.

(Marked "Government's Exhibit 32.")

Mr. GOSSETT. If your Honor please may I hand to the stenographer a stipulation between the Government and Certain-teed, for incorporation into the record.

Stipulation (Certain-teed Products Corp.)

The plaintiff and the defendant Certain-teed Products Corporation hereby stipulate and agree to the matters and statements of facts hereinafter set forth. This stipulation and agreement is made solely for the purpose of this trial and all parts of said statement of facts shall be subject to objections by either side on the ground of relevancy or materiality. Nothing in this stipulation shall preclude either the plaintiff or said defendant from introducing additional or elaborative relevant and material testimony, written or oral.

In lieu of the calling of witnesses, it is stipulated that if certain executive officers and former officers of the defendant Certain-teed Products Corporation (hereinafter called "Certain-teed"), and of Hawaiian Cane Products, Ltd. (hereinafter called "Hawaiian"), were called as witnesses in this trial, they would testify to the facts and circumstances herein-
750 after set forth. It is also stipulated and agreed that the failure of the defendants herein to call said officers as witnesses shall not justify any inference that their testimony, if given, would have been unfavorable to the defendants as to the facts and circumstances hereinafter stated or otherwise appearing in the record herein.

1. Such officers are in a position to know and would know of their own knowledge the facts hereinafter set forth and would know whether or not the defendant Certain-teed or Hawaiian had entered into any contract, combination or conspiracy in restraint of trade, as charged in the complaint, or had entered into any agreement for or engaged in any concerted action with the other defendants herein, or any of them.

2. For a number of years prior to 1932, Hawaiian manufactured insulation board out of bagasse which is the waste product resulting from the extraction of sugar from sugar cane. In 1932, defendant Certain-teed became the selling agent for Hawaiian's insulation board in continental United States and Alaska.

3. Both Hawaiian and Certain-teed found that they were handicapped in the sale and distribution of insulation board and other building materials by reason of the fact that they could not supply their customers with hardboard. Insulation board and hardboard could be shipped in mixed carload lots at the same freight rate and this enabled purchasers to obtain the
751 advantage of carload freight rates on less than carload quantities of either product, thereby permitting them to maintain smaller inventories of each class of goods. Customers of Hawaiian and Certain-teed demanded both products and experience had shown that unless Hawaiian and Certain-teed were able to supply both products to the customer, such customer would

purchase not only the hardboard but the insulation board from a supplier who could furnish both insulation board and hardboard. Accordingly, Hawaiian approached defendant Masonite Corporation (hereinafter called "Masonite") with a view of making some arrangement whereby Hawaiian and its agent Certain-teed might distribute the hardboard manufactured by Masonite. Masonite advised Hawaiian that it would not enter into any arrangement with Hawaiian with respect to hardboard until the final determination of litigation then pending between Masonite and The Celotex Company (hereinafter called "Celotex"), with respect to the patent rights relating to hardboard.

4. Both prior to the aforesaid discussions between Hawaiian and Masonite and subsequent thereto, both Hawaiian and Certain-teed caused studies and research to be made in an attempt to find a way to manufacture hardboard, or a product with the same characteristics, that would not infringe patents owned by Masonite. Such studies and research were unsuccessful in producing a product which in the opinion of Certain-teed's research staff and patent counsel did not infringe the Masonite patents.

5. In August 1933, the officers of both Hawaiian and Certain-teed were aware of the fact that the United States Circuit
752 Court of Appeals for the Third Circuit had sustained the Masonite patent with respect to hardboard. Upon learning of this fact Certain-teed again caused its Research Laboratory to undertake to find a way to manufacture hardboard that would not infringe the Masonite patent. At or about the same time, Hawaiian approached Masonite with a view of negotiating some kind of an arrangement whereby Hawaiian and Certain-teed would be able to meet the demand for hardboard from their customers.

6. In such negotiations, Hawaiian first suggested that Masonite manufacture and make hardboard available to Hawaiian and Certin-teed for their customers, but Masonite refused. Masonite proposed, on the contrary, that Hawaiian take a license to manufacture hardboard under the Masonite patent and offered to give such a license, providing the licensee would make a down payment of $200,000 and agree to pay thereafter a 10% royalty on the sales price of all hardboard so manufactured with minimum yearly royalties of $50,000 per year.

7. Upon learning of Masonite's willingness to grant a manufacturing license upon such terms, Hawaiian and Certain-teed caused a study to be made as to the probable amount of hardboard that they could sell. The result of this study indicated that the annual combined sales of the two companies would probably aggregate between 1,750,000 and 3,500,000 square feet. Hawaiian and Masonite thereupon came to the conclusion that their probable

sales of hardboard were insufficient by a wide margin to justify them in paying the manufacturing royalty demanded, without regard to a return on an investment of probably $500,000 to $750,000, which would necessarily have had to be made for the installation at that time of a manufacturing plant. Investigation also showed that a plant for the manufacture of hardboard could only be operated economically and in competition with Masonite if it produced from 25,000,000 to 30,000,000 square feet of hardboard per year. It was obvious from this that, even on a royalty free basis, it would be most imprudent for Hawaiian or Certain-teed, or both, to erect a manufacturing plant that could only operate economically on an output of from 25,000,000 to 30,000,000 square feet of hardboard per year when the maximum annual sales of hardboard that said companies could forecast amounted to but 3,500,000 square feet.

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8. As a result of these studies and investigation, Hawaiian sought to work out some other arrangement with Masonite whereby Hawaiian and its agent Certain-teed might be able to supply their trade with hardboard. After extended negotiations, Masonite offered to enter into a formal agency agreement and license option. Neither Hawaiian nor Certain-teed was satisfied with a number of the provisions in said agreement as proposed by Masonite and endeavored to induce Masonite to change them, but without success. Finally, after Certain-teed had had no success in the opinion of its research department and patent counsel in finding a way to produce a product with the characteristics of hardboard and at the same time avoid the Masonite patents, under date of December 4, 1933, Hawaiian entered into said agency agreement and license option with Masonite, which is in evidence in this case.

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9. The agreement between Masonite and Hawaiian dated October 29, 1936 was made at the suggestion of Masonite and was for the purpose of clarifying certain questions which had arisen under certain provisions of the 1933 agreement and settling certain disputes and ending certain alleged abuses which had arisen thereunder.

10. The assignment to Certain-teed by Hawaiian on January 30, 1937 of certain rights of Hawaiian under its agency agreement with Masonite of October 29, 1936, was made solely for the purpose of enabling Certain-teed to deal directly with Masonite rather than indirectly through Hawaiian with respect to the sales made by Certain-teed for Masonite of Masonite's hardboard within continental United States.

11. In March of 1940, this action was instituted and defendant Certain-teed learned at that time that plaintiff claimed that the existing agreement under which the defendant Certain-teed was able to distribute hardboard manufactured by Masonite was a

device to defeat the provisions of the Anti-trust Laws and that plaintiff also claimed that it was a mere simulated del credere factor relationship between Masonite and Certain-teed for the purpose of eliminating competition in the production and distribution of hardboard and for the purpose of restraining competition in products competitive with hardboard. Certain-teed had acted under the aforesaid agreements of December 4, 1933 and October 29, 1936 and had entered into the agreement of January 30, 1937, all in the bona fide belief that the contracts in
755 question were in all respects lawful and binding upon the parties thereto. In order, however, to remove any controversy as to the true nature of the relationship, the parties decided to enter into a new agreement and said contract of March 20, 1941 was accordingly made.

12. Said agreement of March 20, 1941 is now in full force and effect and the parties are acting thereunder. Except for said agreement, there is no agreement, understanding or arrangement, express or implied, written or oral, of any nature whatsoever between Masonite Corporation and Certain-teed, with respect to the manufacture or distribution of hardboard or related or competing products, or any other product manufactured or distributed by Masonite Corporation or Certain-teed. It is the intention of Certain-teed to observe fully and completely and in the utmost good faith all of the terms, conditions and provisions of the new agreement, and it has no present intention at any future time of reinstating any pre-existing agreement. In the event that Masonite should at any time fail to adhere to the prices set forth in its published catalogs and price lists from time to time, referred to in paragraph 4 of said agreement of March 20, 1941, Certain-teed probably would exercise its right to terminate said agreement under paragraph 23 thereof.

13. Hawaiian did not enter into said agreements of December 4, 1933, of October 29, 1936 or of January 30, 1937 and Certain-teed did not act under said agreements of December 4, 1933 or October 29, 1936, or either of them, or enter into said agree-
ments of January 30, 1937 or March 20, 1941, or either of
756 them, with any intent whatsoever to joint in any combination, conspiracy or agreement to fix prices with respect to hardboard or to permit Masonite to monopolize the manufacture or sale of hardboard or to limit the markets in which Hawaiian or Certain-teed might distribute said hardboard or to join any other combination, conspiracy or agreement in restraint of trade.

14. Hawaiian and Certain-teed entered into such agreements as they respectively made on the only terms that were acceptable to Masonite and such contracts as drawn represented the only terms upon which Masonite was willing to permit Hawaiian and

Certain-teed to obtain hardboard for distribution to their respective customers. Neither Hawaiian nor Certain-teed was motivated in making any of said agreements by the hope that Masonite would enter into the same or similar agreements with any other person, firm or corporation. Neither Masonite nor Hawaiian nor Certain-ted imposed as a condition to the making or the continuation of the aforesaid agreement of December 4, 1933 any assurances that the same or similar agreements would be made with other distributors of building materials. No representative of Masonite ever stated to any representative of Hawaiian or Certain-teed that Masonite's willingness to enter into said agreement of December 4, 1933 was conditioned upon the hope or expectation that it would be able to make the same or similar agreements with any other person, firm or corporation. Neither Hawaiian nor Certain-teed, nor any representative of either, ever had any discussion prior to the execution of the agreement of December 4, 1933 with any representative of any other company who had theretofore or who thereafter entered into
757 a similar agreement with Masonite concerning any of the terms of such similar agreements made or to be made by any such company with Masonite or as to whether or not any such company was carrying on negotiations with respect to such an agreement with Masonite. Neither Hawaiian nor Certain-teed had any understanding, arrangement or agreement with any other defendant herein who entered into an agreement with Masonite. In entering into all of the aforesaid agreements, neither Hawaiian nor Certain-teed had any purpose other than securing the right to distribute hardboard to their respective customers. Neither Hawaiian nor Certain-teed, nor any representative of either ever suggested or requested the insertion in any of said agreements of any provision for the fixing of prices or the limiting of the class of customers to which either might distribute hardboard. No representative of either Hawaiian or Certain-teed has ever conferred with a representative of Masonite as to the prices to be set by Masonite or any other defendants at any particular time under the then existing agreement between Masonite and such other defendants and no representative of Masonite has ever asked the advice or consent of any representative of Hawaiian or Certain-teed with reference to what would be a proper price for any hardboard product of Masonite. When Hawaiian entered into said agreement of October 29, 1936 with Masonite, both Hawaiian and Certain-teed knew of the existence of other similar agreements between Masonite and others, but until the institution of this action had never seen such agreements or copies thereof. At the time of the making of the agree-

ment dated as of March 20, 1941, Certain-teed knew that
758 Masonite was making an agreement in the same form and at the same time with each of the other defendants herein.

15. Prior to the making of the agreement dated as of March 20, 1941, Certain-teed segregated from all other materials in its warehouses its consigned stocks of Masonite hardboard, but did not erect signs in its warehouses to indicate that the hardboard was the property of Masonite.

16. Certain-teed has not publicly advertised that the hardboard sold by it is a Masonite product or that it was acting as Masonite's agent in distributing hardboard. This fact is, however, well known to its sales organization and some of its customers and no attempt has been made to suppress it.

17. Certain-teed's records do not disclose how the hardboard on consignment with it was insured prior to approximately two years ago, but for the past two years all such hardboard has been covered by a blanket policy of insurance covering personal property of every description "whether property of the insured or the property of others held by the insured in trust or on commission or consignment, or in storage * * *; and also including any property similar to that insured hereunder, for which the insured may be held liable under the terms of any agreement, contract or lease; * * *".

Mr. Cox. I think subject now to the offer of two of these stipulations which are still outstanding, that I am now in a position to rest, and with that reservation I do rest.

759 Mr. TUTTLE. I am not making any formal motion to dismiss, but of course my omission to do this will not be construed as a concession that the Government has made out a prima facie case. I will call Mr. Alexander as my witness.

BEN ALEXANDER, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination by Mr. TUTTLE:

Q. Mr. Alexander, you are the president of the Masonite Corporation?—A. I am.

Q. And you have been such for how many years?—A. I was made president of the Masonite Corporation early in 1927.

Q. Are you also a director of the company?—A. I am a director, sir.

Q. And have been such for the same period?—A. Yes, sir.

Q. Are you a member of the executive committee of the board of directors?—A. Yes, sir.

Q. And for how long have you been a member of the executive committee?—A. Ever since I have been president of the company; that is 1927.

Q. Are you also a substantial stockholder of the company?—A. Yes, sir.

Q. And have been such throughout that period?—A. Since the inception of the company.

Q. Now, Mr. Mason, who is referred to in the main stipulation here as the inventor——A. Yes, sir.

Q. And what positions did he hold in that company down to the period of his death?—A. Mr. Mason originally was vice
760 president and general manager, but shortly after I became president he was given complete charge of research, and continued in that capacity until his death.

Q. And his death occurred about when?—A. In the spring of this year.

Q. You mean the spring of 1940?—A. Of 1940.

Q. Now taking the year 1932 as a starting point, will you tell me the names of the persons who were members of the executive committee with you?—A. In 1932 the members of the executive committee beside myself were Mr. D. C. Everest, Mr. M. P. McCullough, Mr. W. H. Mason.

Q. I understand that they were all members of the board of directors, as well as of the executive committee?—A. That is correct.

Q. Did any of them hold any other positions of an executive character in the company?—A. In the company?

Q. Yes.—A. Mr. Everest was a vice president of the company. Mr. McCullough was treasurer of the company, and Mr. Mason was a vice president of the company.

Q. Mention has been made here of Mr. Gillies, and he has testified. Was he at that time, or at any time, a member of the executive committee or of the board of directors?—A. Mr. Gillies was never at any time a member of the executive committee.

Q. Was he at any time a member of the board of directors?—A. I do not recall.

Q. Now, can you, as of 1932, mention the names of any persons who were members of the board but not members of the executive committee?—A. Yes, sir; Mr. Ernest Mahler, vice president of Kimberly-Clark Corporation, and president of International Cellucotton; Mr. C. C. Yawkey, president of the Yawkey Lumber Company; Mr. W. H. Bissell, president of the Yawkey-Bissell Lumber Company; Mr. C. J. Winton, Jr., an officer of the Winton Lumber Company.

761 Q. I gather that those men whom you have just named were experienced and trained business men?—Q. All the members of the board were experienced and trained business men in lumber, paper, utilities and in banking in Northern Wisconsin. Most of their interests centered in Northern Wisconsin.

Q. Did you at that time have any other business interests, other than the Masonite Corporation, and if so what were they?—A. In 1932, sir?

Q. Yes, sir.—A. In 1932 I was president of the Wausau Paper Mills Company; I was vice president of the Montana-Dakota Utilities Company; I was a member of the board and on the executive committee of the McCloud River Lumber Company. I was a director of the Employers Mutual Liability Insurance Company, and I was chairman of the executive committee of the American National Bank.

Q. Located where?—A. At Wausau, Wisconsin. And I was secretary of the Walter Alexander Company, a personal holding company.

Q. Who was chairman of the board of directors of the Masonite Corporation at that time?—A. We had no chairman of the board, sir.

Q. Were your duties as president the usual duties that attach themselves to that office?—A. Yes, sir; I was in general supervision of all the affairs of the company, but due to press of other matters during the years 1932 and 1933 I did not give all my time to the affairs of the Masonite Corporation, but only attended important meetings and helped in the forming of a particularly important policies.

Q. When the plant at Laurel was built and ready to go, at the time stated in the stipulation of facts here, what was its capacity on a 24-hour basis, stipulated at 350 days a year; do you recall?—A. The plant at Laurel at that time running 24 hours a day, 350 days a year, could make about 45,000,000 to 50,000,000 feet of hardboard a year.

762 Q. Pardon me, what product would that be?—A. That product would be divided between insulation "Quartrboard" and "Presdwood."

Q. "Quartrboard" being a hardboard product?—A. "Quartrboard" and "Presdwood" would be hardboard products made under the Masonite patents.

Q. I would like to have you state to the Court with some fullness what was the financial and business position of the Masonite Corporation in 1932, 1933, down to the time of the decision of the Circuit Court of Appeals?—A. Your Honor, the situation of the Masonite Company was, you might say, desperate. Down at our plant at Laurel, Mississippi, we had a capacity of some 225 to 250 million feet, and we were running that plant at less than 30 percent of capacity. This was only giving the men a few days work now and then, and the long lay-off, and then a few days work again. The condition was so bad that we finally worked out a ration system, and when the men drew their paychecks they

didn't have enough money to buy the proper food for themselves and families, so we gave them orders on the grocery store to buy such food and groceries necessary, which was made up of a balanced diet to keep them in good shape. We were keeping up steam for fire protection and the pumps, and the management down there devised a scheme of using it for canning purposes, because all the people in the South raised a lot of green vegetables, and I might say that at most times the canning factory contained more people in employment than the plant did.

In the sales end of the business we were disappointed in the amount or volume we were getting, but to go into that a little more carefully we called this group of lumber men to take on Masonite. They were not afraid of the forestry; they were not afraid of the production end of the problem, because they had for many years sold lumber and paper products and they
763 thought they could sell the Masonite product to the lumber dealer trade the same as they had sold lumber for many years past, but it had not worked out that way. We hired Mr. R. G. Wallace as sales manager of the company. He started out with two salesmen, one Mr. E. L. Saberson, who is now vice president, and who had the territory I believe east of the Mississippi; and a man by the name of Laddon, who had territory west of the Mississippi River. They gradually built up a sales force, but the sales force was small and covered quite a number of dealers and territory.

Q. When was that?—A. This was when we started building, up to 1932. So in 1932 we had about 40 salesmen on the road. However, whenever we went into a town or city and tried to introduce Masonite hardboard products, the dealer would say, "Well, this product is not known." He would say, "It will take lots of sales promotion on my part to get its acceptance and because of that fact I would like to take it on, if I could have an exclusive arrangement." There was nothing much for us to do but to give that dealer an exclusive arrangement, and when we did that, without any other competition in that city the result was a very excessive dealer mark-up in the product.

Q. By "competition" you mean competition by some other dealer in hardboard?—A. Competition by some other dealer in hardboard products. As a matter of personal knowledge, in Miami Beach, Florida, in 1929, one lumber dealer whose name I cannot recall, was selling 1/8th inch standard "Presdwood" hardboard products for $120 per 1,000. Obviously, you couldn't get any distribution or acceptance by the public at this type of prices.

Q. At that time the list price was what?—A. At that time the list price was $46, I believe.

Q. That difference represented his mark-up?—A. That difference represented his mark-up, which was very excessive,
764 and if we would have had six or seven dealers in Miami Beach, Florida, that mark-up would have been normal for the lumber dealer, which is somewhere between 30 and 40 percent.

Q. But he had wangled out from you an exclusive agency, you say?—A. He put us over the barrel. The financial situation of the company—and that was the next thing in the picture—in the big trouble we had in distribution and in our administration of sales the financial position of the company was rather serious. We had borrowed a million dollars of 5 percent notes—short-term five-year rather drastic trust indenture provisions concerning working capital provisions, and so forth, and $850,000 of those were outstanding. Our preferred stock had three years' dividends in arrears. The preferred stock was 7 percent, so three years would make about $275,000. Our receivables were all pledged to the bank, and we, as officers and directors of the company, personally endorsed about $380,000, and we had very little cash in the box.

Q. Were those endorsements made for payroll purposes?—A. Yes. I know I went up to Milwaukee at one time—we were doing business with the First National Bank—and I got money for payroll purposes there.

Q. I did not mean to interrupt you, except to bring out that fact.—A. I don't think there is anything more to say. I don't think there is much more to say. We could not have been involved in a much worse situation than we were, from a financial point of view.

Q. Was that the situation in July 1933, when the decision of the Circuit Court of Appeals came down?—A. Yes, sir.

Q. What was your funded debt at that time? Was it that figure of $850,000 to which you alluded?—A. Yes, sir; but that was a short-term debt.

Q. Now after that decision came down from the Circuit
765 Court of Appeals, was there a meeting of the executive committee of your board to consider and decide upon the steps to be taken and the policy to be pursued as the result of that decision?—A. Yes, sir; there was a meeting at the Chicago Athletic Club in Chicago in or about the middle of August of that year.

Q. Do you recall who were present at that meeting?—A. All the members of the executive committee, Mr. W. H. Mason, Mr. D. C. Everest, Mr. M. P. McCullough, and myself; besides the members of the executive committee we had called in Mr. Ernst Mahler, a member of our board of directors, and Mr. Frank Dyer, who for a good many years had been in charge of the patents of Mr. Thomas A. Edison and was a friend of Mr. Mason's, and had

been our patent expert witness in the Celotex-Masonite litigation. Mr. Gillies was also present, but not as a member of the executive committee.

Q. You mentioned Mr. Edison. Had Mr. W. H. Mason, the inventor in this case, been associated in the past with Mr. Edison?—A. Mr. Mason was associated with Mr. Thomas A. Edison for 17 years.

Q. Now I would like to have you state the substance as well as you can recall it of the discussion at that meeting in connection with the determination of policy in the light of the decision of the Circuit Court of Appeals reversing Judge Nields?—A. Well, at the meeting we went over the affairs of the company and came to about the conclusion that I have just given you, and found that we were in desperate position and that the one thing that Masonite needed was distribution, and lots of it, and quick, to save it from further financial trouble. Mr. Frank Dyer, I think it was—but I am not sure—suggested that some method of agency, I think he stated like the Mazda lamp distribution under General Electric, might be advisable. We also discussed the pos-
766 sibility of outright sales to people with distribution. We went over the whole picture, and finally came to the conclusion that the agency agreement would be the best for the company and the best for any connections that we might make to help us distribute our products. Mr. Mahler contributed substantially to the conversation, because of the fact that as president of the International Cellucotton Corporation he had a good deal of experience in national distribution and in distribution of the products of Kotex, Kleenex, and other products of that nature distributed by the International Cellucotton Corporation.

Q. Were you personally at that time familiar with the difficulties of getting a new product into the building materials field?—A. No, sir. As I told you before, the mistake we made in Masonite was in not realizing the difficulty of introduction of the product in the building materials field. Now to me the reason is obvious, but it certainly wasn't at that time. In introducing a product in the building materials field, you really have to make four sales. You have first to convince the architect that your product will do the job in the next house that he designs; you have got to convince the contractor that the product can be used for the purpose intended; you have got to convince the lumber dealer that it is a product that people will want, and that he will get a reasonable turnover; and, finally, you have to convince the consumer. So in order to get the product into the building materials field it not only takes the sale, but it takes the resale and it takes pioneer work with the architect, contractor, jobber, dealer, and consumer.

Q. In other words, before you get distribution you have got to get the trade?

Mr. Cox. I really think Mr. Tuttle should let the witness testify.

Mr. TUTTLE. I did not mean to lead, but I think that is obvious. I will withdraw it.

767 Q. At that meeting were or were not these difficulties discussed?—A. Very definitely.

Q. And was there any decision arrived at as to the next steps to be taken?—A. The decision arrived at at that meeting was a very fundamental one, and has been a fundamental one with Masonite since that time; that is, we should add to our direct distribution by distribution through agencies. As soon as we had arrived at that decision, Mr. Mahler suggested that we retain Mr. Quarles, who had done a lot of work for International Cellucotton, to draw up a sort of agreement.

Q. Who was Mr. Quarles?—A. Mr. Quarles was an attorney with the firm of Lines, Spooner & Quarles. Mr. Mason was instructed to go up and discuss the whole situation with Mr. Quarles and have Mr. Quarles make a draft of this agency agreement, and Mr. Quarles did make such an agreement.

Q. I don't want to get beyond the meeting for the moment. Was there any decision arrived at with reference to the Celotex Company, or establishing contact with them?—A. I don't remember just what companies were to be contacted, but it is natural to assume that one of them would be the Celotex Company. Of course, there was pretty bad blood between Celotex and Masonite. We had a long, tough battle, but in my opinion Celotex at that time had the best distribution in just exactly the field we wanted to get into, and I assume approaching them was discussed.

Q. This executive committee meeting—was that held shortly after the Circuit Court of Appeals had announced its decision on the Celotex petition for rehearing?—A. Yes, it was shortly after that.

Q. I am told that decision was made before——A. Before this meeting. The petition had been denied.

Q. So the executive committee meeting was held the day before—it was before the main decision had been made, or

768 shortly after that? Was there at that meeting any thought or any discussion as to the person who might sound out Celotex?—A. I think Mr. Gillies, as general manager, was designated to do that.

Q. Now you have spoken of the retention of Mr. Gillies. Do you know what was done by him immediately after such retention?—A. He drafted an agreement.

Q. Have you personally any knowledge of what was done with the draft of the agreement, to whom it was submitted, and so

forth?—A. I have no personal knowledge of to whom that draft was immediately submitted. I think Mr. Gillies handled that.

Q. Do you know whether or not it was during the month of August, 1933 submitted to the Celotex Receivers?—A. Yes, sir.

Q. Did you personally have any conference with the Celotex Receivers in that connection?—A. No, sir.

Q. Or with their counsel?—A. No, sir.

Q. Now, did you personally during the month of August have any conference with anyone else representing any other company at all concerning the agency agreement?—A. No, sir.

Q. That was handled by other people?—A. That is right.

Q. Now, there has been asked in this trial, Mr. Alexander, quite frequently the question why at that time you decided in favor of an agency agreement rather than an attempt to sell directly through the Masonite Corporation and exclusively by direct sales through the Masonite Corporation. I would like to have you give the reasons which actuated you personally in reaching that decision. Let us have the background and the business factors which entered into that judgment on your part.—A. Well, the background was definitely the condition of the company and
769 the obvious need for quick distribution. Celotex for instance or agents like Celotex had entree into this field and also had broad distribution. Masonite did not have this distribution, did not have this entree, and had not been able to get it. But Masonite had one prime factor in their minds, and that is that we wanted to continue to have a voice in the direction of these sales. With that thought in mind, we had several reasons for entering into an agency contract instead of a purchase and sales contract.

In the first place, the agency contract gave Masonite the right to set the price. In the second place, the agency contract gave Masonite the right to set terms and conditions of sale. Both of those were statutory rights. By that token we could keep to ourselves the industrial field and that was important to us because we were making a lot of offgrade boards and were manufacturing through our process a lot of shorts that had to go into industry and could not go into the regularly established dealer channels. That market was terrifically important to us. We were putting effort on it and we intended to build it up further. Again, any method of distribution except by our own sales force directly was opposed by our sales department and we knew it would be. We knew it would be a terrible shock to our salesmen. We knew it would be a shock to our dealer organization in the field. And we felt quite definitely that if we had an agency arrangement where our sales department, our salesmen and our dealers were on an equally competitive position with the agents that it would soften

the shock and keep up the morale of the sales department and the dealers.

Again, in an agency contract the agents could acknowledge or would acknowledge validity of the Masonite patent and this would at least give us some temporary surcease from constant infringement suits such as we had been through with
770 Celotex and which cost us $150,000. We didn't want any of those for a while. I say that was temporary because of the fact that the agents would have a reasonably short cancellation clause and could carry on their research, make a board any time they wanted to by effecting that cancellation clause. But as long as they did hold a contract and as long as our relationships were satisfactory, we would be relieved of patent infringement suits, which was an important consideration.

In another instance, the agents—and this is an advantage to them—that agency and principal relationship should be mutual—the agency would have the right to ship soft board of insulation board in the same car with hardboard products. This was of vital importance to the agents because they were either manufacturers or sales agents of insulation board, and we had the right to make that mixed car delivery. Now that mixed car delivery was important because it let a small dealer buy a carload lot at the carload price, give him a complete line of boards, and give him a much smaller inventory at less cost than he would have to carry under any other system. That thing was of particular importance to Celotex because of the fact that Celotex had already made and sold a hardboard. Their salesmen were used to selling hardboard. They wanted a hardboard. Their dealers were used to handling a hardboard, and if the Celotex Company didn't have that privilege, it would have been a very serious thing for their distribution and for their volume.

In the last analysis, the agency method in our opinion gave to the agent and also to ourselves a continuity of supply. You can sign a long agency contract and the agent would be sure of supply continuously. But during the time he had that supply he could be carrying on his research, he could be doing all the work he wanted to try to make a hardboard similar to the hard-
771 board made under the Masonite patents, and when he got his board developed, all he had to do was to give us our six months' notification and he could immediately start delivering his own board to a trade he had already established under the agency relationship with Masonite. I think that was important probably to the agent, but still it gave us a continuity.

And, finally, of course, we were able to maintain our own sales force, and an aggressive sales force.

Now our final conclusion on the whole thing was that if the

bases of these ideas were right, that this would be the result: We would have mass distribution. Mass distribution leads to low cost of selling. That would in turn lead to mass production at the source, which would reduce the unit cost of a thousand feet of hardboard products. The fact that there was all this competition in the field between an aggressive Masonite sales organization and its agents and between the agents themselves gave a complete coverage of competition in the field which would tend to reduce the jobbers' and dealers' mark-up price and turn this product over to the consumer at the cheapest possible price, and that is further important because we knew that if Masonite was to be successful we should get into the lower class field, and to do that we had to have a product that got the consumer cheap. We wanted to be down with our competition in plywoods and Gypsum board, so in that field we had a broad field, a broad distribution. Now those were the considerations that led the executive committee to choose the agency route which we have maintained as established policy since that time.

Q. And how has that policy worked out so far as getting mass distribution and mass production and price?

Mr. Cox. Well, I object to that. The figures as to what they have been producing are in the record. I don't know that this witness needs to testify.

772 Mr. TUTTLE. Very well.

Q. I will put it this way: As experience with the policy and decision which you have outlined has developed through the years, has the executive committee or the board of directors of the Masonite Company found occasion to change its decision?—A. No, sir.

Q. You have stated to the Court that you—by "you" I mean the Masonite Corporation—found it necessary to preserve to itself the industrial field. Will you please tell us just what is meant by "the industrial field" and what were the reasons that led to that conclusion?—A. The reason that led to that conclusion was that we made in our normal production—I am making a guess at this—20 per cent shorts, which are boards 4 x 4 and less. We were making during the term of these agreements a tremendous amount of offgrade boards. Those boards could not go into the regular dealer and jobber channel. So they had to go some place.

Q. Just why couldn't they go into the regular dealer and jobber channels?—A. Well, that wouldn't be the proper material to use in there. They were short and defective and the only place for them would be to go into some industrial channel where they could be cut up into smaller pieces or the defects cut out and used. They were not the type of board that was any good for the normal building construction.

Q. If they had been shipped, we will say, indiscriminately in connection with the other boards, what would have been the consequence?

Mr. Cox. Well, I object to that. I don't know what he means.

773 Mr. TUTTLE. I think that is a fair question.

The COURT. If they had been what?

Mr. TUTTLE. Shipped indiscriminately with the other boards.

The COURT. Shipped, you say?

Mr. TUTTLE. Shipped, yes, and sold.

The COURT. I will let him answer.

A. It would just be said that we did not have a quality product. It would ruin the distribution we did have. That would be impossible.

Q. Now, in this industrial field, was there also any special engineering or technical work which was peculiar to that field and which would be expected of your company?—A. The type of salesman that goes into the industrial field is a highly trained capable engineer. He has to go into an industry and show technical men in that industry where our product can be used to better advantage than products that they were then using, and we developed a force of those men, capable engineers and executives. They are a higher type man than the ordinary dealer salesman.

Q. And can you tell me whether or not there were consumers in the industrial field who required of Masonite Corporation special processes in the production of a given product?—A. Oh, very definitely. For instance, the tile industry, which we have developed through this industrial organization, has to have a board with an especially smooth surface. We make that board especially for them for processing into imitation tile that competes with a ceramic tile. We have also developed just in the last two years an item known as aeroplane diestock, which is laminated Masonite used in the aeroplane industry for dies and it is a very specialized type of production, a very specialized type of selling.

774 Q. Now you were in the court I believe during the testimony by Mr. Wallace?—A. Yes, sir.

Q. And did you hear his testimony that he estimated in substance and speaking in general that it cost Masonite less to make its sales to agents than by direct selling? Has Masonite nevertheless since the day when that decision that you described was made, pushed the development of its own sales force?—A. Yes, sir.

Q. And I believe we have in the stipulation of facts here what that development has been without going into it now. But the sales force has been greatly increased; is that right?—A. The

sales force has been greatly increased, advertising has been increased, sales research has been increased.

Q. All those factors of increase are in the stipulation. Now will you tell me why that has been done by your company? Why haven't you just lain back and let the sales agents, your agents, appropriate the contracts?—A. Well, I think there are two reasons. First, we want to give these agents good, stiff competition every day of the year. And, second, we have a patent that expires in 1945 and we want to be ready to carry on these sales if the agents decide to make their own board under some other method. And in the third place, all during the time these agency contracts are going on, an agent can cancel a any time on six months' notice. So we have to be on the alert and be able to carry on the sales at any time under any circumstances.

Q. Now taking up the thread, you stated that in 1933 the Celotex Corporation had abroad distribution, broad contacts for outlet. Just of what character were they? Had they touched the various factors in the building trade?—A. Well, Celotex was one of the very first and at that time the biggest producer of insulation board. Celotex has backed up the Celotex name with lots of advertising dollars. And the Celotex name was as well known in the building field as Kodak or Coca-Cola or anything else in any other
775 field. When you get a name like that in the building field, it is a definite acceptance and that is what Masonite didn't have and that is what we wanted.

Q. Do you know how long prior to 1933 Celotex has been spreading itself in this field of contacts for building materials?—A. Oh, Celotex started making insulation board some time back—I don't know the date.

Q. It was many years, you mean?—A. Oh, yes. They were a pioneer and were aggressive.

Q. Aside from the insulation board, were they also selling other building materials?—A. Yes; Celotex was selling other building materials and was gradually expanding its line until it would cover the whole field. I think that was an established policy of the Celotex Corporation, to have a broad line in the building field including roofing and other products of that nature, gypsum, and so forth.

Q. The first of these agency contracts was made with the Celotex Company on October 10, 1933. Can you tell me whether at that time when that contract was made, it was the plan or purpose of the Masonite Corporation to have only the Celotex—by that I mean the receivers at that time—as its distributional agent, or whether it was the plan or purpose to permit others to become agents?—A. It was the plan and purpose to permit others besides the Celotex Company.

Q. Others of what character?—A. Anybody that had the type of distribution that could get us into the lumber dealer field.

Q. Various agency contracts were thereafter made with other companies. Tell us whether or not in the judgment of Masonite such other companies were those which were of that class?—A. Yes; all the companies were of that class, sir.

776 By the COURT:

Q. How do they happen to be selected?—A. Because they were the people that had the type of distribution.

Q. Who selected them? Did the Masonite Company or did they select themselves or did the group get together and select them?—A. No; they themselves applied to the Masonite Corporation for the privilege of selling Masonite hardboard products.

By Mr. TUTTLE:

Q. Was there at any time in 1933 and 1934, when these contracts were being made, any negotiations with them as a group?—A. No, sir.

Q. Was there, as far as you know, any contacts or negotiations by them with the Celotex Company or with the Receivers in connection with the contracts that they were negotiating with you?

Mr. COX. Well, I object to that. I don't see how he can answer that.

The COURT. I will let him answer, if he knows.

Mr. TUTTLE. I think it is covered in the stipulation:

One counsel wants the question answered. Will you read the question?

Q. (Read.) (Continuing) In other words, did they negotiate exclusively with you as far as you know?—A. Oh, absolutely.

Mr. COX. Are you talking about all contracts?

Mr. TUTTLE. I am talking about the 1933 and 1934 contracts.

Mr. LAMB. May I have the answer read?

(Answer read.)

777 A. (Continuing.) Oh, absolutely. To the best of my knowledge and belief, there was no negotiations with the Celotex Company and all negotiations were directly with us and all negotiations were by their own request.

Q. How many of those companies were in 1933 and 1934 themselves manufacturers of insulation board?—A. Wood Conversion, Insulite, Celotex. All other agents were distributing products manufactured by other insulation board manufacturers.

Q. In those years 1933 and 1934, were those companies that were the manufacturers of insulation board sometimes called soft board?—A. Yes, sir.

Q. There has been reference here in the course of the testimony to the Insulation Institute. Did the Masonite Company

ever limit the agency agreements which were made to companies which at the time such agreements were made, were members of that Institute?—A. No, sir.

Q. So that if those were the companies that were manufacturers of insulation board, how did the other agents so far as you know that signed agency contracts secure their supply of insulation board, if they did?—A. Well, I can't recite them all; I can give you a couple of examples. Johns-Manville at that time was selling a board made in Oswego, New York, called Oswego board. Mr. Baker of National Gypsum was distributing a board made some place around Boston out of spent licorice fiber, and I can't recall at this minute the other sources of supply for the rest of them.

Q. Well, those that were not manufacturing were also however selling insulation board?—A. Oh, as agents. As agents for other manufacturers.

Q. They would get their supply of insulation board from manufacturers?—A. Yes; from sources such as the two I just mentioned.

778 Q. Now, we have had much in the stipulations that have been made concerning the revision of the contract of 1936. Will you tell us why according to your knowledge that 1936 contract was made?—A. Well, one very definite and concrete example is the fact that Celotex through a misinterpretation of the contract made a claim against Masonite for about $100,000 for some interpretation of their method of computing discounts off the dealer and jobber lists. We had to take it to arbitration and I think the attorneys' bill in that arbitration was $7,500. We didn't want any recurrence of that.

Another factor that had grown up was that the agents were making all big dealers wholesalers, and if the practice would have gone on, every dealer and every small lumberyard in the United States would have been a wholesaler. That was a bad practice.

There was the practice of combined bids which had been discussed, and there were other minor infractions that were causing irritation, misunderstanding, and ill feeling, and it was our opinion that we should revise the contract.

Another situation that had come up was that we had found during our short experience with these del credere agency contracts selling Masonite hardboard products that we could afford to increase their commissions, at least the commissions of the smaller agents, and there was a good deal of complaint that they were not making any money under the contract, and there was a lot of pressure put on us for that.

Well, for plain business reasons if somebody is doing a good selling job they should be properly compensated. And for those reasons we thought that we could spell out the contract, clarify the whole situation, increase the commissions, and everybody would be happy. And that is the reason we revised those contracts in 1936.

(Short recess.)

779 Mr. DALLSTREAM. If the Court please, there has arisen in the minds of some counsel in this case in connection with Mr. Dahlberg's testimony, concerning one matter that he testified about in which there was a misunderstanding on their part as to what he meant, and I have been asked to recall him and ask one question. Mr. Cox has graciously consented to permit me to do it at this time, so if we may call him now and interrupt the testimony of Mr. Alexander for just a moment——

Mr. Cox. I don't concede that there is any misunderstanding.

Mr. DALLSTREAM. I understand that.

BROR G. DAHLBERG, recalled, testified further as follows.

Direct examination by Mr. DALLSTREAM:

Q. You are the same Mr. Dahlberg who is president of the Celotex Corporation, and testified a few days ago in this case?—A. Yes.

Q. Mr. Dahlberg, have you read pages 308 and 309 of the official record of the stenographer's minutes on the trial, which is recorded in printed pages 229–230, and also pages 324–325 of such official record, and which is included in printed pages 241–242, and also page 354 in the official record; and at pages 263–4 of the printed record?—A. I have.

Q. In some of those pages, Mr. Dahlberg, you refer to the so-called formula and I ask you to state whether or not to your knowledge there was any formula at any time agreed upon

780 between you or the Receivers of The Celotex Company and Masonite, to your knowledge, or between The Celotex Corportion and Masonite, or between the officials or representatives of any of these companies, not fully expressed in the 1933 agreement, in the 1936 agreement, or in the 1941 agreement, which are the written agreements in evidence in this case?—A. There was not. I can say firmly and without any reservation whatever that the price arrangement in the so-called formula that I have mentioned, was the formula or the words used in the agreement and they were the only arrangement made and there was no understanding and no nothing except what is expressed in the agreements themselves.

Mr. DALLSTREAM. That is all.

Cross-examination by Mr. Cox:

Q. Mr. Dahlberg, just so that I can understand this, you testified the other day that some time you talked to representatives of Masonite about this formula, is that correct?—A. Yes, sir.

Q. Do you recall whether you spoke to any representative of Masonite about it in 1936?—A. No, sir; I do not.

Q. You don't recall now whether you did?—A. No.

Q. Do you know whether you spoke to any representative of Masonite about it in 1941?—A. No.

Q. You mean you don't recall or that you did not speak to them?—A. I did not.

Q. You did speak to some representatives of Masonite, did you not?—A. In 1941?

Q. Yes.—A. No, sir. Oh, I spoke to them about what I call the formula——

By the COURT:

Q. Just a moment; what do you mean by formula? That
781 again is a misnomer.—A. There is a provision in the Masonite agreements that sets out that Celotex can sell at the same price that Masonite sells, or words to that effect. That is what I call it. It does not fix the prices; it does not have any method of fixing the prices, but it means, as I read it, that if they sell at $33, we can sell to the same dealers or class of trade at $33.

By Mr. Cox:

Q. I asked you a moment ago whether you ever discussed that aspect of the agreements with representatives of Masonite in 1941?—A. No, sir.

Q. At this meeting that you testified that you attended in the month of February or March, you did not discuss that matter?—A. No, sir.

Q. Did any representative of Masonite say anything to you about that aspect?—A. No, sir.

Q. There was no discussion at that meeting about that?—A. No, sir.

Mr. Cox. All right.

Mr. DALLSTREAM. That is all, Mr. Dahlberg.

BEN ALEXANDER resumed the stand.

Direct Examination by Mr. TUTTLE (Continued):

Mr. TUTTLE. While Mr. Alexander is returning to the stand, I desire to make a correction on page 282, which I would like to have made——

The COURT. You had better take that up with the stenographer.

782 Mr. TUTTLE. Very well.

Q. We were on the subject of the 1936 agreement; did the so-called favored nations clause in the 1933 or the 1934 agreements have any relation to the making or the content or the manner of making the 1936 agreement?

Mr. Cox. I object to that. It seems to me you are now calling for the witness to construct the contract.

Mr. TUTTLE. I do not mean it as a conclusion, I will put the question differently.

Q. Reference has been made in the agreement on the fact or rather stipulation of facts which was made here to the fact that these agreements were accompanied with an escrow, with an "and/or" sign. Will you tell me as far as you know, what was the reason for that?—A. The reason in the case of the 1936 agreement was very obvious. We had in the 1936 agreement the favored nations clause, whereby any agent could have the benefit of any better terms or conditions that were granted to one of the other agents.

Q. And was that clause also in the 1933 and 1934 agreements?—A. Yes, sir. It was necessary to escrow these agreements with the Harris Trust & Savings Bank, because if we had not done so, if one of the agents would have signed the agreement and gotten the benefit of the increased commissions which we put in, and the other agents had not signed the agreement, then under the favored nations clause they could have the benefit of the increased commissions without the other clarifying changes in the contract.

Q. You have stated that some questions had arisen under the 1933 and 1934 agreements as to how to determine dealers and how to determine wholesalers, and that that subject was dealt

783 within the 1936 agreements; can you tell us what the practice was in making that determination, what body or authority was set up for making these determinations or standards?—A. Well, the basis for the determination as to who was a wholesaler was as to whether or not he was really doing a wholesale function and as such was entitled to commission for so doing.

Q. And by what means were dealers or wholesalers selected or determined at that period?—A. In the agreement, the definition of a wholesaler was spelled out. He had to have certain qualifications, such as maintaining stock, traveling men, and so forth, and those rules determined whether or not he was a wholesaler and entitled to the wholesaler's function.

Q. In the 1936 agreement in connection with that agreement and the practices under it, was there any method used for adopting the selection of persons who would be dealers or wholesalers?—A. Yes. I don't remember the name, but an outside firm

was selected to take these sets of rules and to make independent investigations as to whether or not the firm applying for the wholesale function fitted into that picture.

Q. For purposes of refreshing your recollection, would the name of that outside firm be Dun & Bradstreet?—A. Dun & Bradstreet is the name of the firm, sir.

Q. And what function did they perform in this connection?—A. They were an impartial outside body used to make the determination as to whether or not a firm was a wholesaler or dealer on the basis of the functions set out in the agreement.

Q. And did the use of that term for that purpose apply not only to your own dealers and wholesalers with which Masonite was dealing direct, but also to the dealers and wholesalers which the agents would select?—A. It applied to all equally.

784 Q. Do you recall whether the use of Dun & Bradstreet for this purpose applied only to the selection of wholesalers—differentiating them for that purpose from dealers or also whether it applied to dealers, differentiating them from wholesalers?—A. Yes, sir.

Q. Which way?—A. It was used for the purpose of determining all the dealers of hardboard products in the country, which ones were wholesalers—legitimate wholesalers.

Q. That method of selection or differentiation to which you alluded, did that apply only to hardboard?—A. Only to Masonite hardboard products.

Q. There is an agreement referred to as the 1941 agreement. Will you state the reasons which led the Masonite Company, to your knowledge, to enter upon the 1941 agreement?—A. In my opinion, as a layman and a businessman, I thought that the 1933 agreement and the 1936 agreement were all true agency agreements. The Government, when they brought this case, made some reflections as to the fact, as to whether or not they were true agencies and it therefore seemed to me common business sense to change those contracts to be true agency, and to get advice of counsel, and those revisions were suggested and entered into and made.

Q. In the making of that agreement, which is referred to in the supplemental answers here and which has been mentioned in this case as the 1941 agreement, was there any understanding or meeting of minds to any degree at all beyond that mentioned on the face of the paper itself?—A. Absolutely not.

Q. There were no side deals or under-the-table understandings?—A. No, sir.

Q. Can you tell me whether that is also the case in connection with the 1933 and 1934 agreements, and the 1936 agreements?—A. Yes, sir.

Q. It appears in the stipulation of facts here in connection with the 1933 and 1934 agreements, by reason of special facts applicable in special cases, there were written supplemental agreements made at the same time that the main ones were made, is that correct?—A. That is correct.

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Q. Taking the main agreement and the supplemental agreements, in each and every case were or were not those agreements completely embodying the understandings which you had at the time?—A. They were the complete agreements and there were no outside agreements.

Q. There is in the main stipulation of facts, beginning at page 30, paragraph 15, a reference to certain later agreements, so-called, made with the United States Gypsum Company and those later agreements are annexed. They are in the form of two letters each dated May 15, 1934. Will you please tell the Court the story of the making of those two agreements and what became of them?—A. In 1934, Masonite Corporation found itself handicapped in distribution because it did not have a light-colored insulation board. Our insulation board is brown. It is the color of our hardboard or about the color of our hardboard products, whereas all the other boards on the market are light in color, nearly white. Our dealers were asking us to complement our line of brown insulation boards with the lighter colored insulation board. We attempted to buy such a board from the Celotex Company but that we were unable to do. About that time or a little before, the U. S. Gypsum Company bought a plant from the Chicago Mill & Lumber Company at Greenville, Mississippi, which was very close to Laurel, and from which point we could get, from the Laurel plant, hardboard product and brown insulation, and we could complete a load with white insulation at Greenville, and we had a low frgight rate to take the white insulation board from Greenville down to our warehouse. So we approached the U. S. Gypsum Company and asked them if they would sell us their board at some price—an outright sale. They countered by saying they would be very glad to sell us their white insulation board if we would sell them our line of Masonite hardboard products. It was purely a business deal, and we wanted two things. First, we wanted that white insulation board and second, the del credere agent had not filled up our plant, and I rather figured that Gypsum would sell five or six million feet, which is a couple of hundred thousand dollars worth of business, and I would hate to see a $200,000 order go out of the window, so Masonite got this light insulation board and it also got a customer, and we sold our board to the U. S. Gypsum

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Company at a price less favorable to them and more favorable to us than the prices given to the del credere agents.

Q. When you say at prices given to the del credere agents, you mean what?—A. The discount.

Q. After deducting their discount from what?—A. On their consigned stock.

Q. That arrangement, as I understand it, is embodied in Exhibits S–53–A and S–53–B in the main stipulation of facts here, in other words, those two letters?—A. Yes.

Q. And was there, as part of the trade, any provision by which either side could terminate the arrangement on short notice?—A. There was a 60-day cancellation clause.

Q. Working both ways?—A. Yes, sir.

Q. Was that an agreement by which they were to buy or could buy, rather, hardboard from your company, ever terminated?—A. Yes, sir.

Q. Who terminated it?—A. Masonite Corporation.

Q. And when did it terminate it?—A. About ninety days ago.

Q. These acquisitions by the United States Gypsum Company from the Masonite hardboard, were direct purchases and sales, were they?—A. Yes.

787 Q. There was no agency involved?—A. No, sir.

Q. What caused that termination by your company?—A. They had had a long and extended patent litigation with U. S. Gypsum. They had started to make hardboard. Their hardboard was put on the market but their patents were not of issue. We did not know how they were making their hardboard and we couldn't find out. About the same time their patents became of issue we cancelled this contract and have since sued Gypsum for infringement of the Masonite hardboard patent.

Q. Prior to that there had been, as stated in the stipulation here, interference proceedings between you and Gypsum in the United States Patent Office?—A. That is correct.

Q. Which terminated in your favor?—A. That is correct.

Q. Then Gypsum had instituted in the Federal Court a new action?—A. Yes, sir.

Q. Which was ultimately dismissed, according to this stipulation?—A. That is right.

Q. Attached to the stipulation which was made this morning between Masonite Corporation and the Plaintiff's counsel, there is a diagram which is an exhibit attached to the stipulation as S–13, entitled, "Trend of Masonite's Researches (1930 to 1940)" and which shows during the last four years a very steep increase in the expenditures for research by Masonite Corporation. Will you tell me what the reasons for that steep increase are?

Mr. Cox. I have been very patient about all of this, but that seems to be beyond the bounds of the action and it is quite irrelevant. There is no charge in the bill that there are no researches and as far as I know, there is no charge about research.

Mr. TUTTLE. I have talked about Masonite's researches inasmuch as the diagram itself is set forth in the stipulation
788 and therefore is presumed to be relevant, and it seems to me I can ask for the reason of it.

Mr. Cox. The stipulation itself says all objections as to relevancy are reserved. I am perfectly willing to have the figures in, but to embark on a long investigation about why the research is conducted, I submit is quite unnecessary.

Mr. TUTTLE. I don't think it will be long at all; in fact it will be quite brief.

The COURT. What is the question?

(Question read.)

The COURT. I will let him briefly give what the explanation is without going over what we already know—what the reasons for the research are.

Mr. TUTTLE. I will be very brief about it.

A. The trend of Masonite's research is this: the further we get into the research of wood and the products that we can derive from it, from fundamental properties of wood up to chemical extractions therefrom the more expensive it becomes and the more we are finding out. So, instead of setting up a certain percentage of sales for research, we take up our research problems and make a budget to fit them. In the Masonite Laurel plant we have 35 trained men trying to improve Masonite's products for the benefit of the consumer, to make them cheaper, and at the same time at our office in Chicago, we maintain a sales research, trying to find out what the public wants and how we can further improve our products to get them into new industry and in general to tie up plant research with sales research so we can get the best product to the public at the lowest price. In the second place, our patents expire in 1945 and we hope——

789 The COURT. You have already talked about that.

By Mr. TUTTLE:

Q. That is a further reason, is that the idea?—A. A further reason.

Q. The subject of the trend of prices has been mentioned in the stipulation here, and I would like to ask you a few questions which I think you can answer very briefly. In the current year 1941, has there been any determination by the Masonite Corporation with reference to Quartrboard?—A. Yes, sir.

Q. What was that determination?—A. At the beginning of this year we were selling a board called Quartrboard for $30. We developed in our research a board that in my opinion and the opinion of the trade is much superior for the purpose intended and which does everything that Quartrboard does, plus. It is denser, has a better surface, stiffer, and is a better product all around. In our manufacturing process we could make about 375,000 feet of Quartrboard a day. This product because it is denser, spends less time in the press and we can make nearly 700,000 feet of the product a day. This product was very desirable for national defense in barracks, on tables, interior finish, as well as partitions, all those things, so we raised the price of Quartrboard to $35, in order to make it obsolete, and substituted in lieu thereof 3/16ths wallboard at the sale price as Quartrboard.

Q. You mean the same price as Quartrboard had been?—A. The same price that Quartrboard had been originally sold for and we were able to increase our productive capacity from 375,000 to 700,000 feet a day.

Q. What has been, just in a word, the result between this new wallboard and the old Quartrboard?—A. The Quartrboard
790 has gone out of the window, which shows if you are not in the right price range the product will go out of your line.

Q. Now, did Masonite Corporation at any time during the years that have been mentioned, ever ask the agents, or any of the agents, as to such agent's views or advice as to price which Masonite was setting or would set on its products?—A. No, sir.

Q. Did it ever consult with any of them on that subject?—A. No, sir.

Q. Were there any conferences or discussions at conferences between the Masonite people and the people of any of the agents on any such subject?—A. No, sir.

Q. With reference to the so-called new agreement, the 1941 agreement, is it or is it not the purpose and intent of the Masonite Corporation to observe and carry out the terms and conditions of that written agreement to the exclusion of any terms or conditions in the prior written agreements?—A. No, sir.

Mr. Cox. I object to that.

The Court. Objection sustained. Strike it out.

Mr. Tuttle. Well, then the answer will go out; is that it? Otherwise I want to develop the subject.

The Court. I don't know whether it will go out or not. That was the intention. Perhaps that may be gathered from the surrounding circumstances.

Q. Well, let me put the question this way: it will take about a minute. Does the 1941 agreement attached to the supplemental

answer referred to in the stipulation of facts here constitute the only agreement——.

The COURT. I think he stated so many times that there weren't any secret clauses or agreements with respect to any of these agreements. It is unnecessary to pursue it much further.

791. Mr. TUTTLE. Very well. I will take your suggestion in that respect.

The COURT. It may make me think perhaps there were some, if you press it a great deal more.

Mr. TUTTLE. I think I will take your Honor's suggestion, and I will conclude my examination.

Cross-Examination by Mr. Cox:

Q. Mr. Alexander, I would just like to be clear about it. What is the name of this new board that you spoke about?—A. 1/8 inch "Wallboard."

Q. What is the current price of that per 1,000 feet? Do you know?—A. $30 per 1,000, the same as "Quartrboard" was that was taken out of the line.

Q. And your "Quartrboard" has been raised to $35?—A. That is right.

Q. Now, Mr. Alexander, you testified, I believe, that Mr. Gillies was never a member of the executive committee; that is right, isn't it?—A. That is correct.

Q. But you said he went to one meeting, that you described, which was held?—A. I think he probably went to more meetings.

Q. I was going to ask you: was he in the habit of going to all of the meetings?—A. I don't think he attended all of them. I think he attended some of them.

Q. Would you say it was customary or usual for him to go to meetings?—A. I would say it wasn't. Those meetings were usually held in Wausau, Wisconsin, and Mr. Gillies was in Chicago.

Q. He did go to some of them?—A. Yes, sir.

Q. Now you testified, Mr. Alexander, about the situation which existed in the market of 1932 and 1933. You remember your testimony about that?—A. Yes, sir.

Q. Did you make a study of that situation at that time?—A. Yes, we went into it pretty carefully.

792 Q. And you felt you were familiar with what was happening in the market?—A. Yes, sir.

Q. And you were familiar with the experiences your salesmen were having; is that correct?—A. It was obvious from the sales results.

Q. I want to ask that question again. Did you know anything about the experiences?—A. No, sir; I didn't talk to individual salesmen.

Q. You didn't talk to individual salesmen?—A. No, sir.

Q. Whom did you talk to to get this information?—A. I got my information from Mr. Wallace, who was in charge of sales.

Q. That is, everything you got you got from Mr. Wallace?—A. I suppose Mr. Wallace was my main source of information as to the conditions in the field at that time.

Q. Did you have any other sources of information except Mr. Wallace? You said he was your main source. Do you mean you had some other sources?—A. I suppose Mr. Saberson.

Q. You testified that at that time one great difficulty you were having in connection with distribution was the excessive margins which the jobbers took; is that correct?—A. Yes, sir.

Q. And am I correct in assuming that in the cases in which that happened it was always a case in which you had an exclusive contract with a jobber?—A. Yes; it would be in the case of an exclusive contract, or where we had very limited competition.

Q. Were there any other difficulties that you could think of now, aside from that situation as to the jobber margins, that made it difficult for you to distribute your——A. Well, we were not covering the field. We didn't have enough men to cover the field.

793 Q. You didn't have enough salesmen?—A. That is right.

Q. You didn't have enough jobbers; was that another trouble?—A. We didn't have enough jobbers, we didn't have enough dealers, we didn't have enough salesmen.

Q. Were there any other circumstances which were contributing to your financial difficulties at that time?—A. Will you state that again?

Mr. Cox. Will you read the question?

(Question read.)

Q. Aside from the ones that you have testified to.—A. No.

Q. Was anyone else selling hardboard at that time?—A. Yes; Celotex was.

Q. In 1932 and 1933?—A. Celotex was selling hardboard then.

Q. Do you recall whether you ever got any reports from Mr. Wallace, orally or in writing, that Celotex was selling hardboard in markets in which you were selling, at lower prices than the prices you were selling at?—A. Yes; I remember that.

Q. Did you get any reports of that kind from Mr. Saberson?—A. I can't remember that.

Q. Will you say now that that was not one of the circumstances which was contributing to your difficulties?—A. Well, Celotex's volume was not sufficient to be a predominant factor in working out the decision that we were working out at that time.

Q. Well, there were markets in which you were both selling; is that correct?—A. That is right.

Q. Were you both selling on the Pacific Coast?—A. I don't remember those details. Mr. Wallace had complete charge of the sales, and knew them. I knew that Celotex were making a
794 board, and I knew they were making small sales in small quantities in different places. I had no intimate knowledge of the facts.

Q. Can you think of any other company that at that time was manufacturing hardboard, or a board like it?—A. I don't think so. Insulite made a board at some time, but I think that was a little later.

Q. Do you recall whether at any time prior to 1934 you ever received reports from Mr. Wallace about Insulite's board?—A. No sir.

Q. Did you ever hear it mentioned by anyone?—A. Prior to 1934? I don't believe so.

Q. When did you first find out that Insulite was making a hardboard and selling it? Do you recall that?—A. No, I do not, sir.

Q. Do you recall how you found out?—A. No.

Q. Do you recall whether you ever did find out? I assume you did at some time.—A. I must have found out at some time.

Q. Now you testified that after the decision of the Circuit Court of Appeals there was a meeting of the executive committee. Do you remember your testimony on that point?—A. Yes.

Q. And as I understand your testimony it is that at that meeting you considered what steps your company should take next? That is correct?—A. Yes.

Q. And also I understood from your testimony it is that at that time you considered whether you should distribute by selling to other persons who in turn would sell to jobbers and dealers, or whether you would distribute through agents?—A. That was a possibility.

Q. Well, was that matter discussed at that meeting? The choice?—A. Yes, the choice was discussed.

Q. And you said, as I understand it, on your direct testimony, that it was concluded that you would use the agency arrangement?—A. Correct.

795 Q. I didn't hear you tell us on direct examination, Mr. Alexander, just why it was you decided you couldn't get distribution by selling hardboard. I should like to have you explain that to me.

The COURT. Well, haven't you gone over that? I got the idea that the central one was that he didn't have agents all over the country that were capable of taking care of the distribution, and if they attempted to get such agents they would have to break in

on the agents that were representing other people and probably have to go to a very large expense in setting them up in different parts of the United States. Isn't that about, in substance, the story?

The WITNESS. Yes, sir. We still wanted to maintain a voice in the distribution of our product, and we didn't have the money to do it by direct sales of our own salesmen.

Q. I am sorry, but what I don't understand is why you couldn't sell hardboard to Celotex and have it distribute it through its own outlets, and by its own salesmen?—A. We wanted to keep the control and the direction and voice in the distribution of our products in our own hands, so we didn't want to sell Celotex.

Q. May I ask this question, Mr. Alexander: did you fear that if you sold to Celotex, rather than gave it to Celotex as an agent to distribute, Celotex would not sell as much hardboard as you wanted to sell?—A. Oh, I never thought of volume in connection with that decision.

Q. You never thought of volume in connection with that decision? Now you testified that you wanted to reserve the industrial market for yourself, because of the situation with respect to off-grade board. Do you remember that?—A. Yes, sir.

796 Q. Before I go into this matter will you tell me, Mr. Alexander, whether it is proper to refer to sales which are made to the motion picture industry as industrial sales, or building-trade sales?—A. I think the motion-picture industry was considered a special set-up. A special type of selling was necessary for it.

Q. Is your answer, then, that it was not either an industrial sale or a building-trade sales?—A. No. I suppose in our thought on the matter we would consider it in the industrial field.

Q. In the industrial field. You said that in 1932 you were producing about 20 percent of your volume as shorts?—A. I just made that as a guess. I don't know whether those figures are accurate.

Q. That is an estimate?—A. Yes.

Q. Would you make the same estimate today as to shorts as distinguished from off-grade?—A. The short problem today would be approximately the same. The method of manufacture has not changed.

Q. Was it your fear that if you sold off-grade or gave off-grade board to your del credere agents, that they in turn would sell it to the building trade? Is that your reason for reserving that field to yourself?—A. That is one of the very dominant reasons. We didn't want any inferior product going in to the jobber and dealer trade. That would give Masonite a bad name as to quality of product.

Q. Was there any reason why the del credere agents could not have sold the off-grade board, so far as you know, for industrial uses?—A. Well, the del credere factors did not have an industrial sales organization such as we had. That was one thing. And, second, the price in the industrial field was less than in the dealer field, as I testified this morning, and I doubt whether it would have been profitable for the del credere factors to sell in that field at the prices we were forced to sell when we were introducing the product.

797 Q. Was there none of the del credere factors that had a sales organization for selling the industrial field?—A. I think Celotex had an industrial organization that specialized in refrigerator car. I think they did a lot of business in that. I don't think they covered the general industrial field with an industrial sales organization.

Q. Do you know whether they at that time or thereafter sold any hardboard to the motion-picture industry? I am speaking of Celotex.—A. Yes; they did.

Q. Did they have a selling organization for that?—A. They had a jobber on the Coast.

Q. You also testified that another reason why you wish to use the agency rather than the sales method of distribution was because of the morale of your selling force. Do you recall that?—A. Yes, sir.

Q. And you testified that you felt that under the agency arrangement you could tell them that they were in an equal competitive position. I think those were your words, or something like them. Do you remember that?—A. I don't remember the exact words.

Q. Is that a correct summary of the substance or the purport of what you said?—A. Yes, sir.

Q. Well, am I correct in assuming that what you mean by that is that your agents would be in a position to sell at the same price—your own selling salesmen would be in a position to sell at the same price as the salesmen of your del credere agents?—A. That is correct.

Q. Now you said that another reason, as I understood your testimony, that you used the agency agreement rather than the sales agreement was so that the del credere agents could ship combined carloads of insulation board and hardboard?—A. Yes, sir.

Q. Is that your recollection?—A. Yes.

Q. Is it your testimony that if you had sold through a sales agreement rather than through the agency arrange-

798 ment, that it could not have been shipped out in combined carloads?—A. It could have been shipped out in combined carloads.

Q. That was some reason for making the original selling contracts, but not for making del credere agency agreements?—A. We thought it was a more desirable method——

Q. I am asking you about the mixed carloads. As far as taking advantage of mixed carloads, that could have been done under a sale as well as an agency agreement?—A. Physically possible; yes.

Q. You testified as to the reasons for making the 1936 contract. Do you recall whether you ever discussed those reasons at any meeting at which representatives of the del credere agents were present?

Mr. LAMB. May I have that question?

(Question read.)

A. I do not recall. Mr. Wallace and our counsel, Mr. Fletcher Lewis, were given complete charge of the redrafting of the 1936 agreement. I don't believe I was in any conference.

Q. Do you know whether there were any conferences?—A. No, sir.

Q. You don't recall anything about a conference in Chicago on September 24, 1936?—A. I do not.

Q. You also testified that before you made the 1933 contract with Celotex, and immediately thereafter, your company determined that it would offer similar contracts to anyone who wanted one. Do you recall that testimony?—A. Correct.

Q. Will you look at the companies which are listed in page 22 of the stipulation of facts?—A. Yes, sir.

Q. Will you tell me whether there is any company listed there which was not a member of the Insulation Board Institute?—A. On those dates?

799 Q. Yes.—A. On the dates of the agreement?

Q. Take the dates opposite the name in each case.—A. I don't know whether they were all members of the Institute or not.

Q. Do you have any doubts about any particular ones?—A. Agasote Millboard I don't believe was a member, for one. I don't believe Hawaiian Cane Products was for another, but I am not positive.

Q. That is your present recollection?—A. That is right.

Q. Are there any others there that you think were not members of the Insulation Board Institute?—A. I don't think so.

Q. So far as you know all the others were?—A. Yes.

Q. Did you attend meetings of the Insulation Board Institute in 1933?—A. I can't recall attendance of meetings of the Insulation Board Institute in 1933. I might have attended some meetings.

Q. Do you recall whether you attended any in 1934?—A. No, sir; that was a matter of sales, and the sales force attended the meetings, and I never went as an executive, to the best of my knowledge. I might have gone to two or three of them, but I can't recall definitely the dates or the times.

Q. Did you ever tell anyone, Mr. Alexander, in 1933, or in 1934, that these del credere contracts were going to be made only with members of the Insulation Board Institute?—A. No, sir.

Mr. Cox. Will you mark this letter?

(Marked "Government's Exhibit 33" for identification.)

The COURT. We better go over till this afternoon at a quarter past two.

(Recess to 2:15 p. m.)

800 AFTERNOON SESSION

BEN ALEXANDER, resumed the stand.

Cross-examination by Mr. Cox (Continued):

Q. Mr. Alexander, are you familiar with the table which appears on the last page of the 1941 contracts, which is headed "Rate of Compensation on Different Unit Sales Volume."—A. Yes; I don't know the detailed figures but I know the general purport of them.

Q. Can you tell me whether those percentages which appear there are intended to represent a percentage of the Masonite dealer carlot price?—A. Yes, sir.

Q. That is so, they are, is that correct?—A. Yes, sir.

Q. Can you tell me whether under the 1933 and 1936 contracts, Mr. Alexander, the del credere agents in making remittance to Masonite, made those remittances on the basis of Masonite's dealer carlot price?—A. To the best of my knowledge, they did.

Q. In each case the commission was determined by applying the percentage against the Masonite dealer carlot price?—A. That is correct.

Q. Mr. Alexander, can you give us an estimate as to what percentage of your present industrial sales, and by "present" I mean the year 1940 and this much of the year 1941, consists of offgrade board?—A. I suppose now that we have our percentage of offgrade board manufacture down to ten or twelve percent.

Q. That is of your total production?—A. Yes; of our total production.

Q. Take your total sale of your product for industrial
801 usage, what percentage consists of offgrade board?—A. I don't understand the question.

Q. (Question read.)—A. I don't understand the question.

Q. Let me ask you about that and put the question this way: it is true you sell a certain amount of your hardboard for industrial uses?—A. That is correct.

Q. Of that amount which you sell for industrial uses, of that kind, what percentage consists of offgrade board?

Mr. TUTTLE. You mean excluding shorts?—A. Including the shorts?

Q. Excluding the shorts.—A. It would be a relatively small percentage.

Q. Less than ten percent?—A. It would probably be about 20 percent on the industrial sales—the figure would be between 20 and 25 percent.

Q. You are not including shorts?—A. Not including shorts.

Q. You testified this morning that in 1933 one reason why you wished to reserve the industrial market for yourself was because in your view, the del credere agents would not have selling organizations of the kind which would enable them to sell in that market; is that correct?—A. Correct.

Q. Has that been your view from that time to the present time?—A. Yes, sir.

Q. And is it still your view today?—A. Yes.

Q. And is it your view today that Johns-Manville, for example, has no selling organization which would enable it to sell for industrial uses?—A. Johns-Manville's industrial organization does not, I believe, contact the industrial trade that we have. They are more in the asbestos line and that type of line, and not in the board lines.

Q. Is it your testimony or do you know whether their sales-
802 men are inferior to yours in the kind of training you were speaking of this morning, such as engineering training and that sort of thing?—A. I think their industrial salesmen in their type of distribution are probably equal to ours, but I don't think they are equal to our men in the type of industrial markets to which we sell our board.

Q. Is that because they haven't had experience in that industry?—A. That is right.

Q. What about the Armstrong Cork Company, is it your opinion that they have no sales organization today which would enable them to sell for industrial use?—A. The Armstrong Company has quite a different type of distribution, outside of their distribution for insulation board, than we have. Their big line is linoleum and they sell to applications and that type.

Q. Would you say that their salesmen are inferior in experience and training to yours as far as sales to the industrial field is concerned?—A. No, sir.

Mr. Cox. I would like to have this letter marked for identification.

(Marked "Government's Exhibit 34" for identification.)

Q. You testified this morning that you could not recall, I believe, whether there were any meetings in the Summer or Autumn of 1936 in which you discussed with other persons, with the del credere agents, the execution of new agreements, do you remember that testimony?—A. Yes, sir.

Q. I show you a document which purports to be a letter, or photostatic copy of a letter, rather, written by Mr. Wallace to Mr. H. H. Batchelder, of the Insulite Company, dated September 17, 1935, and I ask you if you have seen a copy of that
803 letter before?—A. This letter is addressed to Batchelder and is signed by Mr. Wallace, vice president, and I have no knowledge of that meeting.

Q. You never saw the letter before?—A. No, sir.

Q. Now, Mr. Alexander, before lunch you testified that you never told anyone that it was the policy of your company to make del credere agreements only with members of the Insulation Board Institute; do you recall that testimony?—A. Yes, sir.

Q. I hand you a document which is Plaintiff's Exhibit 33, I think, for identification, and which purports to be a copy of a letter addressed by you to Mr. I. J. Harvey, Jr., president of The Flintkote Company, dated March 28, 1934, and ask you to examine it and tell me whether you wrote that letter?—A. Yes, sir.

Q. You wrote that letter, did you?—A. I wrote that letter from Wausau, Wisconsin. I think I can tell by the acknowledgment of my secretary on the bottom.

Mr. Cox. I offer the letter in evidence.

(Government's Exhibit 33 for identification received in evidence.)

Q. Now, Mr. Alexander, in the third or fourth paragraph on the first page there is a reference to the Canec or Caneo Company. What company does that indicate?—A. I think that is Canec.

Q. Canec?—A. That is the trade name of the board made by the Hawaiian Cane Products Company.

Q. Mr. Alexander, you testified this morning that you determined in 1941 to change the 1936 contract because your attention had been called to the fact that certain complaints had been made by the Government about those contracts. Do you recall that testimony?—A. Yes, sir; that is correct.
804 Q. And was that the only reason you changed the contracts?—A. Yes, sir.

Q. Now, Mr. Alexander, prior to the execution of the 1941 contract, were you present at any meeting at which representatives of the del credere agents were present?—A. Yes, sir.

Q. Was there more than one meeting of that kind at which you were present?—A. Yes, sir.

Q. When was the first meeting and where?—A. The first meeting was in Chicago, I believe in March—no; about the last ten days of February, some time.

Q. And do you recall who was present at that meeting?—A. There were counsel for the various del crederes, I can't recall their names, and there were some representatives of the executive staffs of the various agencies.

Q. Do you recall whether all of the del credere agents were represented at that meeting?—A. I do not recall definitely.

Q. How many do you recall were represented at that meeting?—A. I can't tell you. I think they were mostly all there. I don't remember whether all of them were there or not.

Q. Was there any other meeting besides that one?—A. The only other meeting I attended was in New York, and counsel were present at that meeting. That meeting lasted three or four days while the documents were being drawn, and I was in and out of that meeting.

Q. And do you know now whether all of the del credere agents were represented at that meeting?—A. I don't know whether they were all—I know they were not all represented, because I know Dant & Russell was not represented, and I can't recall whether any others were unrepresented or not.

Q. Now, at either one of those meetings was there a printed form of contract present for discussion, do you recall?—A. Yes; in the New York meeting there were printed drafts of the contract, and I think there were probably several drafts.

Q. Did you read the printed draft of the contract?—A. Yes, I did.

Q. I hand you the supplemental answer of Masonite Corporation, which contains as an appendix a copy of the del credere agency agreements of 1941, and I call your attention to paragraph 4. Do you remember that paragraph?—A. Yes. What is the question?

Q. Do you recall whether that paragraph or a similar paragraph was in the draft agreement which was discussed at the New York meeting?—A. To the best of my knowledge, it was.

Q. And do you recall whether there was at the New York meeting discussion of the provisions of the paragraph?—A. There might have been discussion of that paragraph by counsel; I don't know. I was in and out of that meeting. I can't remember the specific fact that they discussed that particular paragraph.

Q. You are not prepared to say now that they did not discuss it?—A. No, sir.

Q. Before lunch you testified that it was your present recollection that the Agasote Millboard Company was not a member of the Insulation Board Institute; do you recall that?—A. Yes, sir.

Q. Are you quite sure about it?

Mr. TUTTLE. At that time?

Mr. COX. At that time.

Mr. TUTTLE. January——

A. I think I said to the best of my knowledge. I am not positive.

Q. Do you know whether thereafter it ever became a member of the Institute?—A. I do not. It was the best of
806 my recollection that they never belonged to the Institute, but I might be wrong.

Q. And you also testified, as I recall it, that it was your present recollection that Hawaiian Cane Products, Ltd., was not a member of the Insulation Board Institute; is that corect?—A. Yes, sir.

Q. As of December 4, 1933?—A. Yes, sir.

Q. Today do you know whether or not they have ever thereafter become a member of the Insulation Board Institute?—A. I think they did.

Q. Do you know when they did?—A. No; I do not.

Mr. COX. I think that is all, Mr. Alexander.

Redirect Examination by Mr. TUTTLE:

Q. Mr. Alexander, the Government has put in Plaintiff's Exhibit 33, which is the letter dated March 28, 1934, addressed by you to the president of the Flintkote Company. At that time when that letter was written was the Flintkote Company a member of he Institute?—A. No, sir.

Q. And there is an expression in that letter to the effect that, "In the first place, we told our dealers we were licensing only members of the Insulation Board Institute." I am not reading the whole sentence, but you identify the sentence to which I am alluding?—A. Yes, sir.

Q. Will you explain your testimony of this morning on the subject of the membership in the Institute in connection with this sentence in that letter?—A. Well, I had forgotten that sentence in that letter, but to show, for example, hat it wasn't the stated policy of the Masonite Corporation not to take in as agents members who were not in the Institute is covered in that letter by
807 the fact that Certain-teed, who were then agents, were not members of the Institute and that letter and so that the policy was consistent, we took on the firm of Dant & Russell in Portland, Oregon, as agents, and they are not, and to the best of my knowledge and belief never have been members of the Institute.

Q. Now this letter of yours, Plaintiff's Exhibit 33, contains the statement immediately preceding the statement which I have

called to your attention, to wit, "I"—that is you—"can assure you that if Masonite makes any additional sales agreements that you will certainly be at the head of the list." That was addressed to Flintkote. Flintkote was not at that time, as you say, a member of the Institute?—A. N., sir.

Q. Was there any reason at that time why they were not only assured of being at the head of the list but were not actually taken on as agents at that time?—A. Yes.

Q. What was the reason?—A. Flintkote were not even selling an insulation board at that time. I was a personal friend of Mr. Harvey's. He had just been made president of that company and I knew that without an insulation board that he could not effectively sell Masonite hardboard products, and I suggested therefore that he acquire if he wanted to get into the board business, that he acquire a full line and contac either Arborite, which was a board made up in Maine, or Hawaiian cane, which was a board made in Honolulu, and get in the insulation board business and then later discuss the contract for agency with Masonite.

Q. That is a basic suggestion which you have just alluded to as having been made right in this letter?—A. That is right, sir.

Q. And subsequently, I assume, they did acquire an insulation board line?—A. They acquired a license to sell the insulation products of the Hawaiian Cane Products Company.

808 Q. And then in due time after that an agency agreement was made with them?—A. I think we consummated an agency agreement with Flintkote in 1937.

Q. Mr. Alexander, one or two questions. Has Masonite during the last few years done national advertising for its hardboard?—A. Yes, sir.

Q. In large quantities?—A. I think their budget this year is some $300,000.

Q. Does that advertising campaign cover every State in the Union?—A. Yes, sir; it is a national campaign.

Q. And in that advertising are your products always referred to and described by the generic name of hardboard?—A. Yes, sir.

Q. And the various kinds of products under that are given their special names, in addition?—A. That is correct.

Q. And for how many years has advertising of that character been carried on by your company?—A. We started an advertising campaign when we started to sell. It was pretty small at first but it has been consistent and it has grown every year.

Q. Well, beginning with the latter part of 1933, have you been advertising—although not to the present degree—have you been advertising on a large scale?—A. Continuously, sir.

Q. By that you mean through national advertising mediums?—A. Through national advertising.

By the COURT:

Q. That advertising is of Masonite products, is it not?—A. That is correct.

Q. It features this hardboard under names such as Presdwood and these other names that you have adopted?—A. That is correct.

809 Q. How about the agents? What benefit do they get from that advertising?—A. They get no particular benefit from the advertising except the product they sell is similar to the product which is sold under their own names, so they probably get an indirect benefit.

By Mr. TUTTLE:

Q. And they have advertising men and have had for several years also?—A. I think every one of the agents conducts a national advertising campaign by a more or less amount in dollars.

By the COURT:

Q. But isn't it true that the agents respectively apply their own names to the products which you yourself manufacture and which they sell as agents?—A. That is correct.

MR. TUTTLE. May I add, your Honor, that there is much in the stipulation that has been put in on the subject of the extent to which provisions of selling under their own names the product of Masonite. There is much of that nature.

By Mr. TUTTLE:

Q. In other words, just to close this subject, the agents get for their sales from your company exactly the same hardboard, that is, it is the same thing as you yourself sell?—A. Absolutely the identical product.

Mr. TUTTLE. That is all.

810 Recross Examination by Mr. Cox:

Q. Mr. Alexander, to refer again to Plaintiff's Exhibit 33, you said that at the time this letter was written you had an agreement with Certain-teed, do you recall that testimony?—A. Yes.

Q. I want to read this sentence to you and ask you to explain something to me:

"In the first place, we told our dealers we were licensing only members of the Insulation Institute and that they adhered strictly to that policy with the exception of Certain-teed which are handling our Presdwood, but our direct contract is with the Canec Company, who are, as you know, insulation manufacturers."

I understood you to say in effect that the Canec Company, and by that term you meant the Hawaiian Cane Company, is that correct?—A. Yes.

Q. What do you mean by saying that your direct contract is with the Canec Company?—A. We had an agency arrangement with the Hawaiian Cane Products Company.

Q. You are referring to the arrangement set out in the stipulation?—A. Correct.

Q. Then you add here, "They are, as you know, insulation manufacturers." Does that refresh your memory at all as to whether the Hawaiian Cane Company in 1934 was a member of the Insulation Institute?—A. No, sir; it does not.

Q. You still do not recall as to that?—A. I do not know definitely.

Q. In these advertising campaigns that you have been testifying about for Mr. Tuttle, do you have any typical examples of those advertisements here with you?

Mr. QUARLES. I do not think so.

811 Mr. COX. Well, I can ask him questions without them.

Mr. QUARLES. There is a stipulation to the effect of their names—

Mr. COX. I understand that.

Q. In this advertisement, Mr. Alexander, do you recall whether it is ever stated that any of the del credere agents are distributing hardboard as agents for Masonite?—A. I am pretty sure they do not.

Q. Is there any statement in those advertisements that the hardboard which is being distributed by the del credere agents is made by Masonite?—A. No, sir.

Q. I want to call your attention to something—a document which has been marked Exhibit SS-44, and attached to the supplemental stipulation which Masonite put in this morning which bears the heading "Excerpt from standard specifications for temporary housing, War Department, Office of the Quartermaster General," and ask you whether or not you have ever seen that before?—A. No, sir.

Q. Now I call your attention, Mr. Alexander, to the fact that half way down that page there are three parallel headings, one reading, "For walls, ceilings and partitions," another reading, "For wainscoats," and the other, "Manufactured by." Now I call your attention to the words "Studio Board," "Panel Board," and followed by the words "Celotex Corp." which appears under the heading, "Manufactured by." Do you know whether that Panel Board referred to there is in fact manufactured by Celotex?—A. I am not sure, but I think that Panel Board probably refers to hardboards made under the Masonite patents. I think Studio Board is a board manufactured by The Celotex Corporation, but I am not positive of that; I don't know the trade names of their

products. To the best of my recollection, I think that is correct.

812 Q. That is, your present recollection is that the Studio Board is made by Celotex, the Panel Board is made by Masonite?—A. I think that is correct.

Q. The next two items in the list are "Dualboard" and "De-Luxe Dualboard," Insulite Company. Do you know whether those two boards are made by the Insulite Company?—A. No, sir.

Q. You mean you don't know?—A. I don't know.

Q. You don't know whether that is another name for Masonite hardboard?—A. No, sir.

Q. Now I call your attention to the "PanlBoard" and "De-Luxe PanlBoard" followed by the name Johns-Manville, and ask you whether you know whether Johns-Manville makes those boards?—A. No, sir. As I said, I don't know the trade names that they use for Masonite hardboard products or the trade names that they have for their own products. The only Johns-Manville board I ever heard of is "Flexboard."

Q. You mean the only board you have heard about that they make themselves is "Flexboard"?—A. For their own manufacture I know that name, but I don't know the other names.

Mr. Cox. I think that is all.

(Witness excused.)

Mr. Cox. At this time I should like to offer the annual report to stockholders for the Johns-Manville Corporation for 1940.

(Marked Government's Exhibit 35.)

Mr. Cox. And the annual report of National Gypsum Company dated December 31, 1940.

(Marked Government's Exhibit 36.)

813 Mr. CHANDLER. Mr. Cox and I entered into a stipulation with respect to certain facts in regard to Johns-Manville Sales Corporation, and that stipulation is now offered on the understanding expressed earlier this morning.

(The stipulation is as follows):

Stipulation (Johns-Manville Sales Corporation)

The plaintiff and the defendant Johns-Manville Sales Corporation (hereinafter called "Johns-Manville Sales") hereby stipulate and agree to the following matters and statements of facts, together with the Exhibits submitted herewith and made a part hereof. This stipulation and agreement is made solely for the purpose of this trial and all parts of the matters and statements of facts contained herein shall be subject to objections by either party on the ground of relevancy or materiality. Nothing con-

tained herein shall preclude either the plaintiff or Johns-Manville Sales from introducing additional or elaborative relevant and material testimony, written or oral.

In lieu of the calling of certain witnesses, it is stipulated that if certain executive officers of Johns-Manville Sales were called as witnesses in this trial, they would testify to the facts and circumstances hereinafter set forth. It is also stipulated and agreed that the failure of this defendant to call said officers as witnesses shall not justify any inference that their testimony, if given, would have been unfavorable to this defendant as to the facts and circumstances hereinafter stated, or otherwise appearing in the record herein.

1. Such officers were in a position to know and would
814 know whether or not the defendant Johns-Manville Sales had entered into any contract, combination or conspiracy in restraint of trade, or any part thereof, as charged in the complaint.

2. Prior to March 20, 1941, no signs or notices were put up in the warehouses of Johns-Manville Corporation or any of its affiliated corporations indicating that the hardboard held on consignment was the property of Masonite Corporation (hereinafter called "Masonite"). However, in such warehouses said hardboard was physically segregated in a pile or piles apart from the other materials stored in said warehouses so that it could be identified as the product of Masonite.

3. Prior to March 20, 1941, Johns-Manville Sales did not advertise the hardboard which it sold as of Masonite's manufacture nor did it advertise that it was acting as agent for Masonite. However, it was common knowledge among the salesmen and dealers of Johns-Manville Sales that the hardboard sold by them was of Masonite's manufacture. For example, the first sales bulletin circulated by Johns-Manville Sales to its selling organization following the execution of the agreement dated November 30, 1933, between Johns-Manville Sales and Masonite, specifically states that such hardboard is manufactured by Masonite. A copy of this bulletin is attached hereto and made a part hereof, marked Exhibit JMS-1.

Moreover, during 1934 and the early part of 1935, numerous complaints were received from dealers to the effect that the hardboard furnished by Masofiite to Johns-Manville Sales was inferior in quality to that being distributed by Masonite's own employees. When Johns-Manville Sales called this fact
815 to the attention of Masonite, the latter wrote Johns-Manville Sales under date of March 29, 1935, a photostatic copy of which letter is hereto attached and made a part hereof, marked Exhibit JMS-2. In accordance with the suggestion made

in the latter communication it has been the general practice of Johns-Manville Sales upon receipt of complaints of the nature referred to above, to send to the complaining party a planographed letter in the form attached hereto and made a part hereof marked Exhibit JMS–3. In fact, few such complaints are now received because the term "hardboard" is widely understood as referring to the product manufactured by Masonite.

4. Prior to March 20, 1941, hardboard shipped by Masonite to Johns-Manville Sales and stored in the warehouses of Johns-Manville Corporation or any of its affiliated corporations, was insured under the terms of general insurance policies of the so-called "Floater" type. Such policies ran in favor of Johns-Manville Corporation and its own controlled, allied and subsidiary companies and/or corporations, and covered generally property stored in warehouses and other buildings, specifically including property held by the assured on consignment.

5. A statement showing the dollar volume of the sales by Johns-Manville Sales of all materials, of hardboard, of Flexboard, and of Insulating Board for each of the years 1934–1940, inclusive, is attached hereto and made a part hereof, marked Exhibit JMS–4.

6. Johns-Manville Sales did not enter into the agree-
816 ments with Masonite of November 30, 1933, of October 29, 1936, or of March 20, 1941, with any intent whatsoever to join in any combination, conspiracy or agreement to maintain prices with respect to hardboard or to permit Masonite to monopolize the manufacture or sale of hardboard or to limit the markets in which Johns-Manville Sales might distribute said hardboard or to join any other combination, conspiracy, or agreement in restraint of trade. Johns-Manville Sales entered into such agreements as it made on the only terms that were acceptable to Masonite and such contracts as drawn represented the only terms upon which Masonite was willing to permit Johns-Manville Sales to obtain hardboard for distribution to its customers. Johns-Manville Sales was not motivated in making any of said agreements by the hope that Masonite would enter into the same or similar agreements with any other person, firm or corporation.

Neither Masonite nor Johns-Manville Sales imposed as a condition to the making or continuation of said agreement of November 30, 1933, any assurances that the same or similar agreements would be made with other distributors of building materials. Johns-Manville Sales did not impose as a condition to the making or continuation of said agreements of October 29, 1936, or of March 20, 1941, any assurances that the same or similar agreements would be made with other distributors of building materials.

On October 28, 1936, Johns-Manville Sales knew that del credere agency agreements existed between Masonite and the following companies: Celotex, National Gypsum, Johns-Manville Sales, Armstrong, Wood Conversion, Insulite and Hawaiian Cane Products, Ltd. On March 31, 1941, Johns-Manville Sales
817 knew that del credere agency agreements existed between Masonite and the following companies: Celotex, National Gypsum, Johns-Manville Sales, Flintkote, Dant & Russell, Insulite, Armstrong and Certain-teed.

No representative of Masonite ever stated to any representative of Johns-Manville Sales that Masonite's willingness to enter into said agreement of November 30, 1933, was based upon the hope or expectation that it would be able to make the same or similar agreements with any other person, firm or corporation. No representative of Johns-Manville Sales ever had any discussion prior to the execution of the agreement dated November 30, 1933, with any representative of any other company who theretofore had become or subsequently became a del credere agent of Masonite concerning any of the terms of the sales agreement and license option made or to be made by any such company with Masonite.

The purpose of Johns-Manville Sales in entering into all of the aforesaid agreements was to secure the right to distribute hardboard to its customers. No representative of Johns-Manville Sales has ever suggested or requested the insertion in any of said agreements of any provision for the fixing of prices or the limiting of the class of customers to which either might distribute hardboard. No representative of Johns-Manville Sales has ever conferred with a representative of Masonite or of any del credere agent as to the particular price to be set by Masonite or charged by any del credere agent under the then existing agreement between Masonite and such del credere agent and no representative of Masonite has ever asked the advice or consent of any representative of Johns-Manville Sales with reference to what
818 would be a proper price for any hardboard product of Masonite.

(The exhibits referred to in the foregoing stipulation marked Defendants' Exhibits JMS–1, JMS–2, JMS–3 and JMS–4.)

Mr. Piel. With your Honor's permission I will submit to the stenographer for copying into the record the stipulation which has been entered into by the attorneys for the Government with Flintkote Company, and in view of the making of this stipulation I would like to propose this further stipulation to Mr. Cox:

That the Flintkote Company's refraining from calling any executive officers of Flintkote as witnesses shall not justify any inference that their testimony if given would be unfavorable to

this defendant as to the facts and circumstances stated in the stipulation as to Mr. Harvey's testimony, or otherwise appearing in the record.

Is that agreeable, Mr. Cox?

Mr. Cox. Yes, that is the same stipulation.

I may state, and I think there is no misunderstanding between me and the other defendants as to that stipulation, that I understand that it means that while I cannot draw any inferences from their failure to call anyone to the stand, that I am at liberty to draw any inferences which are permissible if they have omitted anything that they want to put into this stipulation.

Mr. PIEL. This stipulation I am submitting has a number of exhibits, numbered FL-1 and FL-2, and so forth. I under-
819 stand Mr. Cox is going to put one of our annual reports into the record, so that one will remain blank.

Mr. Cox. Yes; I will add those to the record.

Mr. PIEL. There is one other matter with respect to Flintkote. Mr. Cox asked me to report whether we had any brochures or leaflets advertising hardboard. The advertising department has reported to me that the only record they have is of two leaflets, one which was put out prior to 1940 entitled "Flintkote Hardboard, The Board of a Million Uses," and the other which was put out in September, 1940, which is a little less ecstatic is entitled "Flintkote Hardboard, The Building Material of 1001 Uses." Do you want to put those in?

Mr. Cox. Yes, I think I would like to offer those, if there is no objection.

(Marked Government's Exhibit 37.)

Mr. LAMB. On behalf of the defendant Armstrong Cork Company the Government is willing to stipulate that two exhibits——

Mr. Cox. I prefer to have you offer them, and I won't object, Mr. Lamb.

Mr. LAMB. If you will mark these two exhibits I will offer them. You just mark them, and I will say what they are.

(Marked Defendants' Exhibits U and V.)

Mr. LAMB. If the Court please, by stipulation with the Government we offer in evidence Defendants' Exhibit U, being a specimen of the marking of hardboard samples currently offered
820 by the defendant Armstrong Cork Company as agent, and which will be currently affixed to the samples as furnished by the Masonite Corporation; and Exhibit V, which is a specimen of the label designation which will be affixed currently to wrapped packages; these being offered as specimens of the markings applicable to hardboard products handled by the Armstrong Cork Company as agent for the Masonite Corporation.

Mr. Cox. Can you tell us, Mr. Lamb, in addition to the fact

that these are being used currently, how long they have been used?

Mr. LAMB. We just started them.

Mr. COX. I said this morning, your Honor, that there was one motion to strike which I wished to make with respect to a number of these affidavits and statements, and that I would reserve that motion until they were all in. I think the most expeditious way for me to make it——

The COURT. Why wouldn't the most expeditious way be for me to deny your motion as to all of them, on the ground that if they are not material and not important when it comes to the disposition of this case, that they will be disregarded?

Mr. COX. I had rather anticipated that you would do that.

The COURT. Then that will be done. Under the rule you don't have to take any exception.

Mr. COX. I wonder if I could not indicate the particular paragraphs under which the motion is made.

The COURT. I am quite willing you should do that, but why not do that in the absence of the Court.

Mr. COX. I will be glad to do that. I will file a written application.

The COURT. Make it as long as you want.

Mr. TUTTLE. Masonite Corporation rests.

821 Mr. COX. I should say, as Mr. Piel pointed out, that we are going to offer the annual reports of The Flintkote Company. One of my associates is downstairs now getting them.

Mr. DALLSTREAM. Celotex Corporation rests.

The COURT. Everybody else rests?

Mr. LAMB. Armstrong Cork Company rests.

The COURT. All the other defendants rest? Where do we go from here?

Mr. TUTTLE. Well if your Honor please, I think that we would like to have a summing up by one counsel or two on the defense side, if it is agreeable to your Honor, and I understand that Mr. Cox desires also to sum up. If that meets with your Honor's approval I very much would like to adjourn until tomorrow so I could present my summation then. I have not had an opportunity to read over all the stipulations. In fact, I haven't even seen them, except that I saw some in draft form, and I know they have been changed considerably. I think I could also expedite my summing up if I had time to condense it for tomorrow, and get my thoughts together.

The COURT. That is perfectly satisfactory. How long will you take to sum up tomorrow, on the part of everybody who wishes to sum up?

Mr. TUTTLE. Well, I think, your Honor, I will desire to take about an hour, perhaps a little more, perhaps a little less. And I think Mr. Dallstream will desire to follow me with a very brief summation in connection with Celotex Company. Whether the others do or do not desire to sum up I don't know, but I am sure that in any event what they say will be very brief. At any rate, we will be through tomorrow morning.

822 Mr. Cox. I think between 45 minutes and an hour will do for me, your Honor.

(Government's Exhibit 38 marked.)

(The stipulation offered by Mr. Piel on behalf of the Flintkote Company is spread upon the record as follows:)

Stipulation (Flintkote Company)

It is hereby stipulated by and between the attorneys for the plaintiff herein and the attorneys for the defendant The Flintkote Company, that I. J. Harvey, Jr., President of the defendant The Flintkote Company (hereinafter called "Flintkote"), would, if called as a witness, testify as hereinafter set forth. Objections as to the competency of any such testimony hereinafter set forth are hereby waived; objections as to relevancy and materiality are reserved.

The Exhibits annexed hereto, and referred to in the following statement of testimony, are to be deemed offered in evidence by the defendant The Flintkote Company. Explanatory statements appearing upon any of such Exhibits are to be deemed a part of such testimony. Objections as to the competency of any such Exhibits hereinafter set forth are hereby waived; objections as to relevancy and materiality are reserved.

TESTIMONY OF I. J. HARVEY, JR.

1. On March 30, 1931, I entered the employ of and was
823 elected a Vice President of The Flintkote Company. Prior to that time I had been in the employ of the Shell Oil Company. When I became a Vice President of Flintkote, I spent most of my time in a survey and study of the corporation's products and policies in relation to sales problems. I was elected President of Flintkote on March 8, 1934.

2. Prior to 1930 Flintkote had been primarily engaged in manufacturing and selling asphalt products, principally asphalt roofing materials and industrial emulsions. This business suffered seriously in the depression of the early 1930's. Largely for that reason, and because of the wish to sustain the large national selling organization which Flintkote had built up, we, the directors and officers of Flintkote, adopted the policy of diversifying our sales line.

3. This diversification was decided upon not only because new items were thought to have promising sales possibilities in themselves, but also, in line with developing merchandising trends in the industry, because we thought it advisable in connection with successful merchandising of the existing line.

4. That process of diversification of the Flintkote sales line has been going on continuously ever since. Exhibit FL–1 sets forth, by years, a list of new products added to the sales line since 1933. In addition there have been numerous other items added, of a nature more closely allied to the products previously sold.

5. Exhibit S–6 to the Stipulation of Facts dated April 22, 1941, is a general summary of the principal materials presently
824 manufactured or distributed by Flintkote. That Exhibit was prepared according to the general classification adopted for the preparation of similar information with respect to all of the defendants. Exhibit FL–2 is a list of the products manufactured or sold by Flintkote in somewhat more detail, classified in such form as more accurately to reflect their relative importance in the Company's business, their character and use, and the classes of trade in which sold.

6. Net sales of hardboard for the years 1937–1940, inclusive (figures for earlier years not being available), compared with total net sales of all goods sold by the Company, were as follows:

	All net sales (Dollars)	Net sales of hardboard	
		Dollars	% of all net sales
1937	$15,163,866.72	$59,988.00	.0039
1938	15,147,709.06	118,302.00	.0078
1939	17,164,148.03	121,237.00	.007
1940	19,897,747.71	187,287.00	.0094

INSULATION BOARD

7. Beginning in 1931 I became interested in the possibilities of an insulation board as an addition to the Flintkote line, because (1) it was a material handled by the class of trade to which Flintkote sold roofing materials, (2) it was a relatively new material in the building industry and it appeared to me that the variety of its uses in building work would continue to expand, (3) it could be manufactured of a number of different types of fibrous material and appeared to me to offer attractive pos-
825 sibilities for competition on the basis of distinctive quality, character, and appearance, and (4) it was my judgment that public acceptance of the product was increasing and that there would be an eventual much greater demand for volume.

8. I and the other officers and directors of Flintkote have always regarded the fundamental character of the Company's business as being that of manufacture. We have frequently, at meetings of the Board of Directors and at staff meetings, reiterated our policy to preserve the Company's character as such and not to undertake the distribution of products manufactured by others on any extended scale. Any such distribution is viewed by the officers and directors of Flintkote as purely incidental, or as experimental with the view to dropping the product if it is not successful or of entering upon the manufacture of it if trial and experience show it to be successful.

9. From the very outset our intention with respect to insulation board was to go into the manufacture of it.

10. However, in view of the unsatisfactory general business conditions of the 1930's, I believed, and the other executives of the Company with whom I was conferring also believed, that the time was not opportune to recommend to the directors the large additional investment of capital necessary to go immediately into the manufacture of an entirely new product, with respect to which Flintkote had had no background and no experience.

826 11. After I became President of the Company, I recommended to the directors that we should undertake the distribution of insulation board manufactured by others for the purpose of trial and experimentation and in order to acquire familiarity and experience with the product.

12. In March of 1935, Flintkote began to purchase and resell, in small quantities, insulation board manufactured by Insulite Company.

13. In September of 1936, Flintkote entered into a contract with Hawaiian Cane Products, Inc., of Hilo, Hawaii, pursuant to which in March 1937 Flintkote began the distribution and sale of insulation board as selling agent for Hawaiian.

14. During this period plans for Flintkote's own manufacturing of insulation board were studied and developed and, in June 1940, Flintkote began construction of an insulation board mill, on expandable plans, at Meridian, Mississippi, at an investment for land, building, equipment, and timber reserve lands of approximately $2,000,000. As now erected, this plant has a capacity of 100,000,000 feet per annum.

15. The Hawaiian Cane agency agreement has been cancelled and Flintkote is now engaged in selling the insulation board of its own manufacture.

16. For the year 1937–1940, inclusive (figures for earlier years not being available), net sales of insulation board by Flintkote, for its own account and for the account of Hawaiian Cane, were as follows:

827 INSULATION BOARD NET SALES

	Feet (estimated, ½" equivalent)	Dollars
1937	7,359,000	$193,212.00
1938	13,227,500	396,692.00
1939	18,295,200	428,512.00
1940	38,250,700	919,641.00

HARDBOARD

17. Neither I, nor any other officer or director of the Company to my knowledge, had any original interest in selling hardboard as such. In the course of my study of the marketing of insulation board, however, it became my opinion that hardboard was a virtually necessary adjunct to the successful selling of insulation board. (I will later refer to this again.)

18. At some time during the year 1933 the infringement suit brought by Masonite against Celotex, and the decision of the Circuit Court of Appeals for the Third Circuit in July, 1933, came to my attention. Later, in 1934, I learned that Masonite was suing a customer of Insulite, and finally in the early part of 1935 that the litigation was settled. I was told in conversations with persons in the industry that Insulite had "thrown up the sponge" on its claims, which I understood to mean that Insulite had been forced to admit that its process infringed the Masonite patents.

19. From time to time during 1933 and 1934 it came to my attention that various manufacturers of softboard were distributing Masonite hardboard. I came to the conclusion, and
828 the various other officers and directors of Flintkote came to the conclusion, that in order to enable Flintkote to compete with those other distributors of insulation board, it would be necessary for Flintkote to have either the Masonite hardboard or some directly competitive substitute.

20. When this decision crystalized in my mind, as I now recall it, the first thing which I did was to ask our patent attorneys to look into the patent situation on hardboard and any hardboard-like products which could be found, and our Research Department to study the subject. (I will later refer to the nature of the research and investigation which has continued down to the present time.)

21. The conclusion to which I came in my mind, and the conclusion to which the other officers and directors of the Company came in discussions with me, was that the Masonite patents were not only valid but also basic, and that there was no possible method for manufacturing a non-infringing board which would be directly competitive with the Masonite hardboard, or which

could be offered for substantially all the uses in which Masonite hardboard can be employed, or which could be manufactured at a cost to compete with Masonite's low production cost.

22. It was some time in the latter part of 1933 that I first told Mr. Ben Alexander of Masonite that Flintkote was seriously thinking of going into the insulation board field and that we were coming to the conclusion that in that connection we ought to handle their hardboard. I asked Mr. Alexander if Flintkote could get hardboard from Masonite.

829 23. In this or in conversations shortly thereafter, Mr. Alexander told me that Masonite was interested in expanding its manufacture further and desired to get as much distribution for its product at as small an overhead cost to it as possible. He told me that in order to be able to devote its resources to the expansion of its manufacturing, Masonite had decided to extend its distribution by appointing as agents others who had nation-wide facilities for sale and distribution. He also told me that in order to develop the market for hardboard in a sound and orderly manner Masonite wished to sell through sales organizations which were thoroughly experienced in the handling of building board lines. Mr. Alexander further told me that Flintkote's sales organization was not sufficiently of this character but that if Flintkote went into the insulation board business and acquired experience in the merchandising of the building board line, Masonite would consider giving Flintkote an agency. Mr. Alexander said that Masonite would extend its distribution slowly and carefully in order to give each agent who was taken on a substantial selling opportunity in the market as an incentive to the agent's "pushing" the hardboard line. Mr. Alexander said to me that he was sorry not to be able to give us the hardboard which we desired to have as an aid to getting into the insulation board business, but that the Masonite organization was adhering strictly to its adopted distribution policy in order to prevent deterioration of its plans for developing the market.

24. Following these conversations with Mr. Alexander, and in connection with negotiations with Insulite regarding a
830 supply of insulation board, Insulite agreed to permit Flintkote to sell Masonite hardboard as a subagent. Between April 1935 and March 1937, small quantities of hardboard were sold by Flintkote under this arrangement.

25. In July of 1936 after I had reached an agreement with Hawaiian Cane for the distribution of its Canec insulation board, and after Flintkote had been selling both insulation board and hardboard for over a year, I again approached Mr. Alexander. I told him that we had built up our sales organization for building board products, that I felt we now had enough experience in the

handling of building boards to push them on a sound basis, that we were about to be taken on as a selling agent for Hawaiian Cane, and that we would like now if possible to obtain hardboard direct from Masonite. Mr. Alexander said that he considered Hawaiian a good board and would again take up with the Masonite organization the question of giving Flintkote an agency.

26. I had absolutely no interest whatever in obtaining hardboard on an agency basis rather than some other basis. I was anxious only to obtain hardboard on any practicable terms.

27. A draft of agreement was prepared by Masonite and submitted to us and was the subject of discussion by the representatives of the two corporations from time to time between December 1936 and March 1937. The agreement (Exhibit S-46 to the Stipulation of Facts dated April 22, 1941) was entered into on March 16, 1937.

831 28. At no time prior to the commencement of this action did I, or (so far as I know,—and in the regular course of business such information would be brought to my attention) any other official of Flintkote, ever see a copy of any other agency agreement entered into by Masonite either before or after March 16, 1937. At the time of the execution of the agreement between Masonite and Flintkote dated March 16, 1937, Flintkote knew that Celotex, Certain-Teed, Johns-Manville Sales, Insulite, National Gypsum, Wood Conversion, and Armstrong were selling Masonite hardboard; Flintkote had heard and believed that the foregoing named companies were distributing Masonite hardboard under agency agreements with Masonite. Early in March 1937, when the form of contract which was finally executed by Flintkote was in our hands, I began to worry specifically about whether or not our contract was different from the contracts of other agents, my interest in this regard being as to whether we had sufficiently favorable terms to enable us to compete effectively with the other agents. Early in March 1937 we wrote to Masonite asking to be advised which parts of our agreement were identical with other agreements and if there were differences what the differences were. No reply was received by us to that inquiry until after we had signed the agreement of March 16, 1937, and the reply given us was general in nature and to the effect that we had substantially as favorable selling terms and compensation as did the other agents.

Advertising of Hardboard

29. The Flintkote Company did not advertise the hard-
832 board as Masonite's product by means of radio broadcasts, billboards, paid advertisements in newspapers or other

periodicals, trade literature or counter displays. However, it was at all times generally known among the customers of Flintkote that the Hardboard distributed by Flintkote is manufactured by Masonite. All of Flintkote's salesmen knew the source of the hardboard sold by Flintkote and, so far as the executives of Flintkote know, gave accurate answers to any questions regarding the source and identity of the Masonite hardboard. While no general written instructions have been circulated to all salesmen, various salesmen have been instructed from time to time by various executives of the Company to give accurate information respecting the hardboard sold by Flintkote. While there has been no attempt or desire on the part of Flintkote to mislead its customers as to the source of hardboard, I have been glad to have it sold under the Flintkote name, in accordance with the requirements of our agency agreement, simply because every duplication of the Flintkote name in the stockrooms and display rooms of our customers is that much more advertising, and incidentally because it may have some slight psychological effect in building up acceptance for a Flintkote hardboard product if and when Flintkote is able to go into the manufacture of a similar product itself.

Warehousing of Hardboard

30. The consignment stocks of Masonite hardboard were held by Flintkote principally in warehouses which housed only insulation board and hardboard. In such warehouses, the insulation board and hardboard were physically segregated in readily
833 identifiable masses. In addition, small stocks of hardboard were carried at other warehouses containing general inventories. At all warehouses, the Masonite hardboard in stock was always readily physically distinguishable from other goods in stock. No signs as to Masonite's ownership were posted prior to March 20, 1941.

Insurance on Hardboard Stocks

31. The Masonite consignment stocks held by Flintkote were covered under fire "and additional coverage" policies covering personal property at all factory and warehouse locations. In each of such policies, the Flintkote Company was named as the assured and the coverage of each of such policies extended to all personal property of every kind and description, whether the property of the assured or the property of others, and whether held in trust, on consignment, on commission, sold but not removed, or otherwise. The provisions of the three insurance policies which were in force during the period immediately prior

to March 20, 1941, respecting the coverage of the policy, are typical of all such policies in force since March 16, 1937:

1. "On personal property of every kind and description (except as hereinafter excluded), including such property as the terms of this policy require to be specifically mentioned, the property of the assured or held by it in trust, or on consignment, or on commission, or sold but not removed, the property of others for which it may be liable or otherwise held * * *."

834 2. "The property of the insured, as above described, and also including the insured's interest in and/or legal liability for such property of others when held by the insured in trust, or on commission or consignment, or in storage, or for repairs or alterations, or under contract of purchase * * *."

3. "On Stock, consisting principally of insulating board, including packages for and containing same; their own, the property of others for which they may be liable, while held in trust, on commission, on consignment, on joint account with others, in storage or otherwise held * * *."

Agreement of March 20, 1941

32. At some time after the institution of this action it was brought to my attention by counsel that Masonite proposed to enter into new agreements with its various agents, provided that the agents would be willing to accept a uniform form of contract as proposed by Masonite, for the purpose of obviating from the existing agreements certain terms and features to which the Department of Justice had taken exception. I executed the new agreement on behalf of Flintkote because in my judgment the new agreement involves certain business advantages for Flintkote as compared with the old agreement. At the time of the execution of this new agreement of March 20, 1941, I knew that del credere agency agreements existed between Masonite and Celotex, Certain-Teed, Johns-Manville Sales, Insulite, National Gypsum, Wood Conversion, Armstrong and Dant & Russell, and I also knew that new agreements in the same form as Flintkote's agreement

835 with Masonite of March 20, 1941 either had been or were about to be executed by all of these other companies. While I understood that Masonite wished to do future business with these companies on a uniform basis if at all, and while I therefore believed that Masonite might decline to execute this new agreement with Flintkote unless all of the old agreements were cancelled and terminated, nevertheless my execution of this new agreement on behalf of Flintkote was not conditional upon the execution of a similar agreement by any of the other defendants, and I would have been willing to, and because of said business advan-

tages would have desired to, execute this new agreement regardless of whether or not a similar agreement were executed by any other company whatever.

33. It is my intention, and the intention of the other officers and directors of Flintkote, to carry out and operate under the new agreement of March 20, 1941 in strict compliance with its letter and spirit; there is no intention on the part of Flintkote, and no wish, at any time to reinstate the old agreement.

34. So far as I know—and I believe that I would know of it if any such thing had happened—no one representing the Masonite Corporation has ever asked anyone representing the Flintkote Company for his views, advice or consent with reference to the price being set by Masonite for its hardboard products, nor have any such advice, views or consent ever been expressed by any representative of Flintkote.

35. There has never—so far as I know, and I believe I would know of it—been any understanding, arrangement or agreement between anyone representing The Flintkote Company and
836 anyone representing Masonite or any of the other del credere agents, except as expressly set forth in the agreements between Masonite and Flintkote which are in evidence, relating in any way to the distribution of hardboard by Flintkote or by anyone else.

36. Except for the provisions contained in the agreements of March 16, 1937 and March 20, 1941 between Masonite and Flintkote relating to prices to be observed in the selling of hardboard pursuant to the said agreements, neither I, nor—so far as I know, and I believe I would know of it—any other officer or director of Flintkote has at any time made, or attempted to make, or had any intention to make, any arrangement with Masonite or with any other person as to the price or prices at which either hardboard or insulation board would be sold.

37. My desire with respect to hardboard in the past has been to obtain a supply as an adjunct to sales of insulation board on any practicable terms, and at the best rate of compensation which Masonite would be willing to allow; my only intention as to the future is to perform the agreement of March 20, 1941 in accordance with its terms and to have Flintkote, which is essentially and fundamentally a manufacturing concern, go into the manufacture of a hardboard type of product at its Meridian, Mississippi plant as soon as it becomes commercially and lawfully feasible to do so.

RESEARCH

38. The spirit, purpose and intent with which I approached the subject of hardboard when it became apparent to my organi-

837 zation that the handling of hardboard would be necessary in order to make a success of insulation board, was to consider this product for manufacture by Flintkote, I directed research, and investigation of the patent situation, to be made.

39. From 1934 to date many possibilities have been investigated by the Flintkote organization. So far, the conclusion in every case has been that the proposal is barred under the scope of the Masonite patents, or that, while not infringing, it is not commercially or economically feasible for competition with the Masonite product. In the opinion of the Flintkote organization the Masonite plant represents the cheapest conversion operation now being conducted in the United States, and the lowest cost plant of its kind in the world. With respect to one proposal after another which has been taken up by our research and patent staffs, the verdict has been that the product's cost would be too high.

40. I estimate that since 1935 over $30,000 of our research expense is allocable to investigation of possible hardboard-like products alone. German, Swedish and other foreign patents have been studied.

41. Upon the signing of the Masonite agency agreement of March 16, 1937 our efforts to find a substitute for Masonite neither ceased nor diminished. On the contrary our efforts were accelerated and intensified, as the experience with selling Masonite hardboard has increased my interest in getting the Flintkote Company into the production of a similar material.

838 42. In August of 1937, five months after executing the del credere agency agreement, The Flintkote Company sent a shipment from New Orleans to Allgau, Germany, of wood chips of American growth for the purpose of having samples of a hardboard-like product made up under the Basler process which was investigated exhaustively by Flintkote patent experts and technicians before being rejected on the basis of prohibitive production costs. This decision with respect to the Basler process was arrived at after three production cost estimates had been made, including an exhaustive study and analysis by independent experts.

43. The following describes some of the processes and propositions which were given particular study and attention before being rejected as unworkable; in addition we investigated a great many other materials which were intended to compete in the hardboard market as a whole but of which no record has been kept because they were found unsuitable on relatively short study:

American Catalin Company.—In 1936 we took up with the American Catalin Company an idea for saturating rag felt with resins which would then be put under a hydraulic press to produce a sheet material which would be similar to hardboard, except that we were hopeful of obtaining far better finishes than were possible

on hardboard material. It was found that production cost would be prohibitive.

Basler Board.—Beginning in 1936 and extending through 1937 very thorough investigation was made of a product manu-
839 factured in Germany under German patents. It was found to have characteristics very similar to hardboard, but the process involved very complicated operations, including a number of manual operations, and it was finally rejected as involving prohibitive production costs, as mentioned above.

Charles W. Gold.—During the first six months of 1939 we investigated very carefully a process submitted to us by Mr. Gold for the manufacture of a material similar to hardboard. This was to be made from wood shavings, sawdust, skimmed milk and formaldehyde. Our laboratory spent considerable time trying to manufacture samples of this material and our Cost Department carefully went into the costs. After considerable study, it was found that this product was too expensive to make and still compete with hardboard.

Allied Development Corporation.—In 1939 we carried on correspondence and study with the Allied Development Corporation of Cleveland, Ohio in an effort to develop a product which would be competitive with hardboard. This particular product was manufactured from spent pickle liquor from steel mill operation, a waste product of the steel industry. A pilot plant was put into operation at Sharon, Pennsylvania. After studying this product and testing it, it was found that it was brittle and would not be suitable for our purposes.

Microcel.—In 1940 we investigated a product made from wood fibres, cement and news fibres to produce a thin sheet wallboard material which would be comparable to hardboard and at
840 the same time be somewhat fireproof. Our investigation of this product extended over a considerable period of time, but it was found to be impractical for us to make.

Alling & Cory Wallboard.—In October 1940 a type of wallboard was submitted to us by Alling & Cory for consideration. We studied this quite carefully and it appeared to be satisfactory to compete with hardboard products. However, the fact that the product contained a considerable quantity of sulphur made it impractical in view of its inflammability.

Improlite.—Early in 1941 we investigated the possibility of making hardboard out of insulation board at our Meridian, Mississippi, plant. This method consisted of saturating the insulation board with terpin hydrate and then subjecting it to pressure and heat. This was found to be impractical because of the high cost of the saturating material.

RELATION OF HARDBOARD TO FLINTKOTE'S BUSINESS

44. Exhibit FL–3, submitted herewith, is the Flintkote Annual Report, prepared by me and under my direction, for the calendar year 1940.

45. Exhibit FL–4 shows the net sales by Flintkote, in quantities and dollars, of insulation board and hardboard from 1937 to 1940, inclusive, compared with total net sales in dollars of all goods sold.

46. For the year 1940 the net profit of Flintkote from selling hardboard is estimated as being a little more than 4% of the net sales of hardboard. For the same period, the net profit
841 of the Company from all sales was approximately 8% of net sales of all products.

47. In my view, and in the views of the other officers and directors of Flintkote, the importance of hardboard to the business of Flintkote is as an adjunct to our sales of insulation board. It has been my observation, judgment and belief that wholesalers, dealers, and jobbers think of these building board items as allied goods and usually check and replenish their stocks of both items at the same time. Exhibit FL–5 shows percentages of mixed and unmixed shipments of hardboard for a six months' period from Flintkote's Port Newark warehouse, and in the judgment of the officers of the Company the percentages shown are representative of the experience of the Company in this regard for all of its warehouses. The reasons which have been given by other witnesses upon the trial of this action for the need and desirability of hardboard as an item in a building supply sales line, particularly in conjunction with softboard, have been reported to me, and are all reasons which have since prior to 1937 been present in my mind, and in the minds of the other officers and directors of Flintkote, as the basis for our desire to be able to handle Masonite hardboard.

48. As the chief executive officer of Flintkote, in general charge and supervision of all of its operations, and as a member of the Board of Directors in charge of the formulation of the policies governing the Company's business, I have had complete general knowledge of all of the activities of Flintkote relating to the distribution and sale of insulation board and hardboard. I
842 have read the answer and the supplemental answer of the defendant, The Flintkote Company in this action, both verified by George K. McKenzie, the Secretary of the Company, and to the best of my knowledge and belief all of the denials and allegations therein contained are true.

49. As of February 5, 1941, the last date for which the information is available, there were approximately 6,400 holders of Flintkote's stock, including stockholders located in every State in the

United States, and no one of whom, according to the Company's records, owned more than 3% of the outstanding capital stock. Flintkote employs over 3,200 persons in its manufacturing, sales and administrative operations.

(Exhibits FL-1, FL-2, FL-3, FL-4, FL-5 attached to stipulation.)

The COURT. We will adjourn until tomorrow morning at ten-thirty.

(Adjourned to May 1, 1941, at 10:30 a.m.)

843 COLLOQUY

NEW YORK, *May 1, 1941;*
10:30 o'clock a. m.

TRIAL RESUMED

Mr. COX. If your Honor please, may it be noted on the record, for purposes of identification, that the patents of Celotex Company which were offered yesterday as Exhibit No. 26 are patents numbered 1,942,723, patented January 9, 1934; 1,881,418, patented October 4, 1932; 1,973,637, patented September 11, 1934; 1,949,917, patented March 6, 1934; 1,935,196, patented November 14, 1933; 1,909,213, patented May 16, 1933; 1,880,972, patented October 4, 1932; 1,880,971, patented October 4, 1932, and 1,880,965, patented October 4, 1932.

Mr. CHANDLER. Your Honor, before the closing statements start, there was one small matter that I would like to add to the stipulation on behalf of Johns-Manville Sales Corporation, and I understand that it will be agreeable to Mr. Cox to take my statement in lieu of evidence.

The statement is simply this: that since the execution of the agreement of March 20, 1941, and in accordance with Paragraph 17 of that agreement, the labels which accompany the hardboard sold by Johns-Manville Sales Corporation and the samples of that hardboard which are distributed to its dealers and to the trade, bear the words, following "Johns-Manville," "Agent of the Masonite Corporation." And the sales literature of Johns-Manville since the 1941 agreement carries the statement "Johns-Manville acts solely as agent of Masonite Corporation in making sales of hardboard and panel board."

844 Mr. Cox. That statement is agreeable to me, except that I understood, Mr. Chandler, that the use of the labels on the sales literature was subsequent to April 1, 1941.

Mr. CHANDLER. That is correct.

Mr. Cox. Yesterday, before the parties rested, it was agreed that we might add to the record a statement showing the total

assets, total liabilities, and the corporate structure of Wood Conversion Company as of December 31, for the years 1938, 1939, and 1940. I now offer for the record such a statement, which also shows the gross sales and the net income of the company for each of the designated years.

Marked "Government's Exhibit 39"

Mr. Cox. There is one additional piece of paper which the defendants have agreed to produce. That is the balance sheet of the Insulite Corporation, which we hope will be given to us the next day or two, and it is understood we may add that to the record.

I stated yesterday, if your Honor recalls, that I wish to file a motion to strike certain paragraphs and statements of evidence, and you said that I might and that it would be overruled. I now offer that for the purpose——

The COURT. Overrule the motion. I have already covered that, I think, in what I said yesterday. I will take the testimony or the evidence for what it is worth.

Mr. Cox. The only purpose of the written motion is to designate the paragraphs to which it is addressed, so that there would be some indication as to the paragraphs we are moving with respect to.

The COURT. Yes.

Government's Summation

Mr. Cox. With your Honor's permission, I can now proceed to make a closing statement for the plaintiff in this case. I hope to hold this statement within the limit of 45 or 50 minutes,
845 but in any event I should like, with the Court's permission, to reserve 10 or 15 minutes for the purpose of reply after the defendants have concluded.

The issue in this case, and the only issue as I see it, is whether the contracts which exist between Masonite and the other defendants are illegal under the Anti-Trust law. In my opening statement I pointed out that in the bill of complaint we made three charges with respect to those contracts.

First, that they violated Section 1 of the Sherman Act, because they unlawfully restrained trade; second, that they violated Section 2, because they were an attempt or a combination intended to permit Masonite to monopolize the manufacture of hardboard; and, third and last, that the contracts and understandings between the defendants violated Section 3 of the Clayton Act.

In the interest of shortening my closing statement, I propose to devote all of that statement to the first point, to wit, that

these contracts violate Section 1, because they unlawfully restrain trade. If briefs are filed, as I anticipate they may be, I shall develop the other two points in the brief. The facts as to the question of the contracts and as to their general nature and contents are hardly in dispute at all. The chronology has been developed so frequently in the testimony that I think it is unnecessary for me to do much more but set forth in a very summary way that chronology, largely for the purpose of giving some coherence to my later treatment of the legal points which are involved.

From our point of view the story begins in 1930, when there were three companies manufacturing hardboard; that is Masonite, Celotex, and Insulite. You have heard how at that time a number of the other defendants were engaged in manufacturing or distributing insulation board, the softboard, which is a
846 related product. Masonite, Celotex, and Insulite all possessed patents which related to hardboard.

They were selling their hardboard in the same market, and price competition existed between them. I think that these facts are established beyond much doubt.

Then we have heard about the infringement suit which Masonite brought against Celotex after negotiations for a patent license arrangement proved fruitless. We have also heard how Masonite prevailed in the District Court and lost on appeal in the Circuit Court of Appeals, and how thereafter the two companies resumed their conversations and as a result of those——

The COURT. Masonite didn't lose.

Mr. Cox. Celotex lost in the Circuit Court of Appeals. And after that decision the companies resumed their conversations, which culminated in the agreement, the first del credere agreement, which was executed on October 10, 1933. I think the evidence supports the conclusion that while Masonite was negotiating with Celotex it was also considering the execution of similar agreements with other companies. I think the evidence also indicates that before the execution of the Celotex agreement copies of proposed agreements had been submitted to some of the other defendants. After executing the agreement with Celotex on October 10——

The COURT. Before you come to the agreement, do I understand you make any point whatever that there was collusion of any kind with respect to the settlement of the patent litigation between Masonite and Celotex?

Mr. Cox. Well, I make the point, your Honor— "Collusion" is not the word I should have used. I make the point, which I shall develop later, that the settlement itself, so far as it related to the disposition of the litigation is beyond criticism. But our objec-

tion is to the fact that the settlement at that time involved the making of the particular del credere arrangement which——

847 The COURT. Well, I wasn't referring to the terms of the settlement, but merely to the background of the settlement. I want to know whether the Government makes any contention that that was not a settlement after a very bitter litigation.

Mr. Cox. There is no question that the litigation was bitter, and there is no suggestion that the patent litigation was collusive. I shall make the argument and the suggestion at a later point in the argument that the motives of the parties in reaching the settlement were somewhat mixed, in the sense that I believe we have a basis in the record for argument that both Celotex and Masonite were apprehensive lest the patents, all the patents regarding hardboard, be invalidated, so that there would be no patents whatsoever in the picture.

The COURT. You are not intimating in any way that this Court at this time should go back of the decision of the Circuit Court of Appeals?

Mr. Cox. I don't see how I can make that suggestion.

The COURT. And you are not suggesting, either, that that was not an actual decision so far as the Federal Court is concerned on the validity of the patents, and perhaps the decision as pronounced by the Circuit Court of Appeals of the Third Circuit——

Mr. Cox. Certainly that decision is binding, and I suppose controls.

The COURT. And you are not suggesting that there was anything but a very shadowy possibility that the Circuit Court of Appeals on an application for a writ might take the case.

Mr. Cox. You mean the Supreme Court?

The COURT. The Supreme Court.

Mr. Cox. I am not making any concession of that kind. I don't know what the situation was. They might have taken it.

848 The courts below split two judges against two, and there are plenty of patent cases on the books where the Supreme Court has taken a case on that basis.

The COURT. Are there? I didn't know that there were. At that time the Supreme Court had never taken a patent case on an application for a writ of certiorari unless there was a difference between the Circuits. I am making a broad statement. I can't back it up with statistics. Have you read Mr. Justice Stone's opinion in the Triplett case? If you read it I think you will find there that he takes it as almost a rule of the Supreme Court at that time in that Triplett case that they don't take a patent case unless there is a difference of opinion between Circuits.

Mr. Cox. I think it was undoubtedly true that in most of the patent cases which the Court has taken have been cases in which

there was a conflict between the Circuits. But I wouldn't like to make the statement that they never have taken a patent case unless there was a conflict between the Circuits.

The COURT. I am not taking that as a fact, because I haven't the statistics, but that was my impression, that until very recently they had not taken——

Mr. COX. It is my impression, but I should like to check that before asserting it without any doubt. It is my present recollection that in the Carbice case there was no conflict between the Circuit Courts of Appeal, that there had been a conflict between the Circuit Court and the District Court but none between the different Circuits. I should say that that is my present recollection. I should like to check that. But that is what I believe.

The COURT. That was not a question of patent infringement, was it?

Mr. COX. I am not a patent lawyer, but patent lawyers have told me it is a case which applied simply to the question of contributory infringement.

849 The COURT. Contributory infringement, but not on the question of the validity of the patent.

Mr. COX. That is quite true, although I think it would be also accurate to say perhaps in that case there was some controversy as to the scope of the patent.

The COURT. The controversy was not on the scope of the patent in Justice Brandeis's opinion, was it?

Mr. COX. The case suggests that he was dealing with that question. I admit that, except he assumes certain limitations on the scope of the claims for the purposes of his decision. You asked me a question a moment ago which I did not have an opportunity to answer in as precise form as I should like, and I think I should like to answer a little more precisely, because I don't know exactly what the situation is. I assume the decision of the Circuit Court of Appeals was binding within that circuit, for all purposes. I am frank to say that I am not quite clear at the moment what the situation was as to other circuits, as to whether the same question came up there between different parties which might have presented a different situation.

The COURT. It would present an entirely different situation and there might very well have been in a different circuit a different result.

That, as I understand it, at that time was really the only way that the case could for all practical purposes, go to the Supreme Court of the United States.

Mr COX. After the time expired, after the writ was withdrawn, that certainly was true.

The COURT. It would have to be against the different parties, that is, they could not have gone into a different circuit and sued The Celotex Company again on that patent.

Mr. COX. I suppose the question, speaking of claims, they might conceivably have gone up in a contempt proceeding under the Circuit Court decree, if the contention was that the process which Celotex was using did not infringe the claims which had been sustained in the opinion. I don't know, I merely suggest that.

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The COURT. Who decided the Circuit Court of Appeals case?

Mr. COX. Judge Thompson, I believe—that is my impression. Woolley and Davis were with the majority and Thompson dissented.

I had reached the point of saying that the first series of contracts which followed the Celotex contracts was executed on October 31, 1933, and the last on February 8, 1935. At this point all the defendants except Flintkote, Dant & Russell and Certain-teed had signed the del credere agreements. These three companies that I mentioned came in at a later date.

Certain-teed, although selling hardboard in 1934 and 1935 as agent for Hawaiian Cane, did not actually become an agent under the contract of assignment until 1937 and the two others, Dant & Russell and Flintkote, came in in 1937.

These contracts were effective until the 28th of October, 1936, when the new set of contracts were executed, and became effective simultaneously.

The defendants then continued to operate under those contracts until the 1st day of April of this year, when they actually began operations under the contracts which were executed and dated as of March 20th.

I shall later in this argument, in discussing the agency point, refer in more detail to the provisions of these contracts, but I would like to say, and I think for the sake of emphasis that all three have these three things in common, in our view. In the first place, as to all three, Masonite set the prices which the agents were required to observe under the terms and conditions of sale and in our view all the contracts also required Masonite to adhere to the same prices and terms and conditions of sale which were set for its agents. And finally in all of the contracts, the industrial market was reserved by Masonite as its own domain.

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That is just the agency chronology of the contracts. I think so far as the rest of the evidence was concerned, I can better discuss it in connection with the particular legal argument which I am now going to advance.

Our first position, as I have said, is that these contracts appearing under Section 1 of the Sherman Act are in unlawful restraint of trade. I make that argument on two grounds. In the first place, let us assume, for the sake of argument, that these agreements are true agency agreements. We say even if they are true agency agreements, they are nevertheless illegal under the decisions of the Supreme Court, including the decision in the General Electric case.

In the second place, we state that these contracts are not now and have never been true agency agreements, and so for that reason they are illegal under the anti-trust laws.

I am now going to take up the first point which is that these contracts are illegal even if they are in fact true agency agreements—a statement I am making just for the sake of argument—we say the contracts are illegal at this point because they are contracts which fix prices as between Masonite and the other defendants, and because Masonite and the other defendants either have been in the past or are now in a kind of competitive position which makes it impossible for them under the anti-trust laws to make agency agreements of this kind.

I think there isn't much dispute about the basic facts upon which we rely here. Of course the contracts fix the prices. There is no dispute about that.

The COURT. Aren't you in that second argument completely ignoring the patents?

Mr. Cox. In a sense, I am, and I think I should. I am coming to that in the first part of the argument. I say the
852 patent, as such, has nothing to do with it, and that their rights are as great without the patent situation as they would be with the patent situation. These agreements are not license agreements and if they have any argument on the patent situation, it must be the argument which I am about to discuss.

The COURT. Well, that is the whole basis of their argument. That is the whole basis of the argument. I suppose they will concede that if the patent gives them no monopoly, that they have no basis whatever.

Mr. Cox. Well, if I were in their position, I would concede that, and perhaps they do; I don't know.

The COURT. Perhaps they don't have to, but I don't know. And I should think their real standing, in so far as this case is concerned, is based on the validity of these patents as determined by the Circuit Court of Appeals of the Third Circuit.

Mr. Cox. If they must stand on the patents alone, then it seems to me that they are in a very difficult position indeed, because these agreements are not the kind of agreements which are covered by the patent privilege.

As I understand the patent law, a man who has a patent can do two things: He can keep it to himself, keep anybody else from using it or from using the product which is covered by the patent. That is one thing he can do. The other thing he can do is to grant licenses to people, either on broad or on restricted terms, permitting them to use the patented product or the patented process on certain terms and conditions. That is the limit of the patent privilege, and these defendants have not done so here.

The COURT. Well, as to that, he can keep to himself the right to sell, can't he?

Mr. Cox. He can keep it to himself and he can sell the product, but I say if he makes any other kind of a contract,
853 if he makes any contract, selling agency or anything else, that that contract then is subject to the anti-trust laws in just the same way any other contract is, even if there wasn't any patent; that the fact that he can withhold it entirely from the market does not mean that he can put it into the market on any terms he pleases.

The COURT. Well, why can't he set his own salesmen's price on which the salesmen are authorized to make a sale?

Mr. Cox. I think he may do that. I think he may.

The COURT. Well, therefore, in the last analysis, your two points should be rolled into one, namely, as to whether there was an agency contract which constituted these different defendants' salesmen for the purpose of selling the product, isn't that so?

Mr. Cox. It may be that that is the case too, but I do not draw the same conclusion from the salesmen, i. e., from sending out salesmen that a company employs.

The COURT. I hope you don't mind my interrupting you as you go along, because I don't want it to interfere.

Mr. Cox. I think this is perhaps more illuminating to both of us than it would be if I just continued in my prepared statement.

But, your Honor, to say that because they can tell their own salesmen, people that they employed in the relationship of master and servant, at what price they can sell this commodity, does not lead me to the conclusions that they can go into the market and make that kind of an arrangement with ten large companies who are actual and potential competitors in distribution and were at least potential competitors in production. One proposition just does not seem to lead to the other in my mind.

The COURT. Well, what is the distinction? You say one is bigger than the other and one is called a contractor and the other called a salesman, but in principle, if there is a real agency, why isn't that similar, in so far as price is concerned, to the figures that are given to the salesmen?

854 Mr. Cox. Well, I say that one difference is this, that these people have insisted that their so-called agents are competing with them for customers. Now, your own salesman is not competing with you for customers. He may be competing with his brother salesmen, but he is not competing with you, and my point is that there is a difference between telling your salesman, who does not compete with you, at what price he shall sell your goods, and making an arrangement with your competitor in distribution and telling him the price at which he shall sell the goods. It seems to me that is——

The COURT. Well, there again you are rather ignoring Mr. Chief Justice Taft's opinion in the General Electric case.

Mr. Cox. I don't think so, your Honor, because——

The COURT. In spite of the fact that I noticed in your brief that you spoke of something called a vertical arrangement and a horizontal arrangement. Those terms may mean something in the art that I did not quite comprehend, but I suppose you mean by that that these defendants were competitors and potentially, as you say, or actually competitors, whereas the General Electric Company was using salesmen, large and small, for the purpose of marketing their products.

Mr. Cox. That is correct.

The COURT. But I think the Westinghouse Company was one of those salesmen, wasn't it?

Mr. Cox. Well, that, your Honor, was by a patent license contract, and that presents quite a different situation. If this thing had been done by a patent license agreement, we would have quite a different situation, too.

The COURT. Well, there was a patent license agreement in so far as the Celotex Company was concerned, wasn't there, to enable the Celotex Company to sell as an agent?

Mr. Cox. I don't understand that any license was granted by Masonite to Celotex Company.

855 The COURT. Well, there is somewhere—I haven't read many of these papers, but I did look at the original contract of October 10, 1933, and it had attached to it something that was called a license to the Celotex under the patent.

Mr. Cox. I think that was an option to take a license, your Honor, that was attached, which was never exercised. I think that was attached to all the agreements. That was a patent license, but it was an option to take it on the terms that are set out, and it was never taken, as I understand it.

At least, as I interpret these contracts—the defendants may take another view of them—under the contracts Masonite does not grant any patent rights as such to any of these defendants, but

simply gives them authority to sell the product which Masonite produces.

To come back to the G. E. case, I think your Honor has grasped the point I was making about the agents there. My point is that, at least so far as the distribution was concerned, there was no substantial competition. I infer from the record in that case, that between G. E. and its agents there was absolutely no evidence in that record that any of the agents had ever been an actual or even a potential competitor of General Electric so far as manufacturing was concerned, because the agents there were engaged simply and solely in distribution. Indeed, the record says that most of them were engaged in distribution in particular localities or regions, so that I assume—and there were 25,000 of them, as I recall it, of all kinds—so that I assume that was the kind of a situation in which the General Electric was using their agents to tap or to reach markets in which it did not sell directly itself. The record there shows that G. E. sold about 20 percent or 22 percent, I think, of its bulbs or its lamps directly to consumers, but those were sales, the record shows, that were made to large consumers who could be served from certain warehouses. So that the inference which I draw is that the markets in which
856 the agents of G. E. were selling them were different and there was no competition of the kind which the defendants themselves assert exist in this case, that is, the kind of competition where they are selling the same kind of people.

The COURT. At the time these agreements were made, starting October 10, 1933, there was and could be no competition from any of these defendants so far as Masonite was concerned, because that had been completely obliterated by the decision of the Circuit Court.

Mr. Cox. I can't accept that point of view, your Honor, except as to Celotex. That might have been, I think, as to Celotex, but there was nothing in the record to show that it was true of Insulite. In fact, the testimony from Insulite's executive officer, which is on the record, and which explains why they made the del credere arrangment with Masonite, does not suggest in any way that they made it because they felt that they had to in order to avoid infringing Masonite's patents. What the statement says is that they did not feel that they could afford to put up a factory, they did not have the money to build a plant. There is no showing so far as Insulite is concerned, for example, that there was any decision or adjudication.

The COURT. They had staring them in the face a preliminary injunction.

Mr. Cox. Yes.

The COURT. Under the patent, in the Third Circuit.

Mr. Cox. But they had an opportunity to use a process which did not infringe the claims which were adjudicated in that case. Furthermore, this fact, which I think has not been developed in the oral testimony, is quite significant on this patent. Insulite, apparently, had some patents at one time or another, and they must have been patents that were pretty good, because
857 in 1938 Insulite granted a license to Masonite, an exclusive license under patents or patent applications numbering something more than a dozen, relating to the making of artificial wood, and that license was not only exclusive, in the sense that Insulite could not grant anybody else a license like it, but it was exclusive in the sense that Insulite itself could not use its patents while the license agreement existed. And the agreement, licensing agreement, contained a provision which empowered Insulite to cancel it on 30 days' notice if the del credere price-fixing arrangement between the two companies should cease to exist.

So I can't, on the facts, accept the proposition that there was absolutely no way in which any of these defendants could have produced hardboard.

The COURT. Well, that is rather a strong expression, when you say "absolutely no way." That is going a long ways. I would not assert that for anything. But if you put yourself objectively in the position of one of these defendants at that particular time and had to face not only patent litigation of long duration and very expensive and, at the end of it, if you won, having to build a plant at substantial cost, you might well be a little bit chary about embarking on that course.

Mr. Cox. I think that is probably true, and I think that the tendency in a situation of that kind would be to reach some kind of an arrangement with Masonite. But I assert again that that situation does not serve to justify the legality of the particular arrangement which was entered into.

The COURT. I agree with you on that entirely. I too was quite impressed with Mr. Dahlberg's testimony to the effect that during all these years since 1933 he and his staff had tried to find and develop some way to get away from these patents, and they did not succeed in doing it, which is a fairly good tribute to
858 the patents themselves and the merits of them. It may be that that was based on a construction of them by the Circuit Court of Appeals, which may not have been justified, but still it was there.

Mr. Cox. Well, as I said a moment ago, I have no doubt about the commercial necessity of some kind of an arrangement, but the thing we are attacking here is a particular arrangement. Whatever bearing that evidence may have on the motives of the parties

other than Masonite, it does not seem to me that it necessarily invalidates the argument which I have been making as to the illegality of the arrangement under Section 1.

I think that if there were a charge or if we were now arguing that Celotex had conspired with Masonite willingly to let Masonite do all the manufacture, an argument which I am not making in connection with this particular point, that that testimony of Mr. Dahlberg's would be of considerable weight against the argument. But all I am saying now is that whatever the motives were which put them in this arrangement, and I think there were probably a great many motives, the arrangement itself cannot be justified under the General Electric case, because the parties are not in the position that the General Electric and its agents were in that case. Their business and economic position are different. Now, it may be that their economic and business position was difficult, and it may be that Masonite forced this thing on them. Indeed, I got the impression from Mr. Dahlberg's testimony, that while he wanted an arrangement, this particular arrangement was not to his liking, but of course for the purpose of determining whether the contracts are illegal it does not make any difference, it seems to me, whether Masonite forced it on them or whether they embraced it with enthusiasm. If this contract and the other contracts are illegal because of their provisions and the
859 effect they have, I suppose it is in one sense not important why the parties made them provided they acted consciously and intentionally, as I assume they did.

The COURT. Well, both of them, of course, had selfish motives in making them, there is no doubt about that. People do not sit down and enter into such an arrangement as that unless they believe it is advantageous for both sides.

Mr. COX. I assume that, but I am indifferent to that because the selfish motive is not a violation of the law. So far as I am concerned, the character of the motive in that respect is immaterial.

I have indicated one respect, but I should like to point to another respect in which I think this case is somewhat different from the General Electric case, and that is in connection with the limitations which these agreements put on Masonite's own competitive power.

Now, I construe all these agreements as requiring Masonite to sell at the same prices at which it fixes for its agents. I understand from a statement Mr. Tuttle made yesterday, that as to the two earlier sets of agreements, those which were first made in 1933 and between 1933 and 1935, and those made in 1936, this construction is conceded. While Mr. Tuttle did not make the same concession as to the 1941 agreement, it seems to me if you read the provisions of that agreement, particularly the provisions which

relate to prices, it is very clear that Masonite, under that agreement, is required to adhere to the same terms and conditions which it sets for its agents. One thing is certainly clear under that agreement. Masonite is limited in its competitive power in this respect: It cannot change its own price for certain periods of time or, to put it another way, a change in its own price cannot become effective for a certain period of time. If it wants to raise its price, it has to give its agents 10 days' prior notice, and
860 that increase cannot become effective on the part of Masonite or anyone else for 10 days. If it wants to lower its price, it has to give the agents 48 hours' notice and Masonite's new price cannot become effective for 48 hours.

In other words, what this contract does clearly, on its face, is to set up a kind of open price filing system so far as Masonite is concerned, whereunder it has to file a price in advance of putting the price into effect. Of course I can't testify, but I say that the agents are required or that Masonite is required to allow the agents to sell at that price, which I think is the fact. Under the provisions of the agreement, I say, if it does not let them sell at that lower price, they can cancel the agreement, which it seems to me are the only two possible constructions. It doesn't make any difference which one is adopted, it seems to me the result is the same; Masonite here has substantially limited its power so far as its own direct sales are concerned. There is nothing like that in the General Electric case, and there isn't a thing to show that in its agency agreements the General Electric placed any limitation whatsoever upon its own power to sell at any price it wanted to when it sold direct.

I think it is quite obvious the reason they did not. The reason was because the G. E. was not competing with its own agents in any substantial way. It is only when you have the agents and the so-called principal competing that you have to have that kind of a reciprocal price provision.

That seems to me to be a pretty substantial ground of distinction in one way between this case and the G. E. case.

Now, I think the defendants are going to say that that particular point is of little consequence because, under the Robinson Act, Patman Act, they will assert that Masonite is bound
861 to sell at the same terms which the agents sell; if it did not, it would be guilty of a serious discrimination.

Now I have a few comments I should like to make about that point. The first thing, it seems to me that if it is a fact that under the Robinson-Patman Act it would be illegal in every instance for Masonite to sell to some purchaser at a price lower than the price at which its agents are selling it would hardly be necessary to put these provisions in the contracts which are designed

to limit Masonite's power in that respect. But in any event that is not what the Robinson-Patman Act provides. It does not prohibit price discriminations. It does not prevent Masonite absolutely from selling at a lower price than its agents sell at. Under the Robinson-Patman Act a seller can make a price discrimination if it can be justified in terms of cost, and if Masonite could justify that price discrimination in terms of cost it could make a sale at the lower price if it were not for this contract.

There is another phase of the Robinson-Patman Act which I think is interesting in this connection, and that is this: the Robinson-Patman Act only prohibits discrimination which destroys competition. In other words, you have to show when you make the discrimination that you have injured someone's competitive power. If Masonite went into the market and offered hardboard generally to everybody at a price lower than the price at which its agents were selling there could not be any charge that that price discrimination injured the competitive power of Masonite's purchasers, because everybody who wanted to could buy it from Masonite at the lower price. If it is suggested that that discrimination was injuring the competitive power of the agents my answer is I don't see how under the Robinson-Patman Act a discrimination can be illegal which merely injures your own agent, because there is no way in which you can injure competition by injuring yourself. If these people are truly agents, which I am assuming for the purpose of this point, and if they are agents of Masonite, at least in the legal sense, that would be an injury to Masonite.

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The COURT. According to that argument that particular part of the contract was just entirely unnecessary. I don't see why it is not.

Mr. COX. Oh, no.

The COURT. Not only in law, but also morally. If I constitute you my agent for the purpose of selling my property, and then I go out on a dark night and sell it for a smaller price than I have authorized you to negotiate for the sale of it, I think you would have a pretty good grievance against me, wouldn't you?

Mr. COX. I have no doubt I would have a grievance.

The COURT. It might ripen into a lawsuit, too.

Mr. COX. If a contract were drawn the right way I might get you into a lawsuit, but I don't conclude from that that you can make an agreement of this kind, whereby, in circumstances like these, you agree to adhere to the prices which your agents charge. I think that the care——

The COURT. Well, Masonite wouldn't have had any agents left if it proceeded to go out on the open market in competition with

its own agents and cut the price here and there and everywhere on its own patented product.

Mr. Cox. I think probably to make this kind of an arrangement it would have to make an agreement with its agents to adhere to the same prices, which to my mind suggests that there is another distinction between this case and the G. E. case, because there they didn't have to, they weren't competing wtih them, and that seems to me to illustrate the substantial difference between the position of the del credere in this case.

The COURT. Why do you say in this case they were competing?

863 Mr. Cox. They all testified that they were. Their counsel have asserted that they served the same customers in the same markets and they tried to take customers away from each other. That, of course, is why they had to have this provision, which required Masonite to adhere to prices and give notice. I say if they had not been engaged in selling in the same markets, that sort of thing would be unnecessary.

I would like to make this point about the General Electric Company case, particularly in relation to the facts which it seems to me is something which well deserves consideration. I notice I am running well over my estimate of time.

The COURT. That is all right, take all the time you want.

Mr. Cox. I think you might get the impression from the defendants' argument that the General Electric Company case is one of the few cases in the three hundred odd volumes of the United States Reports which interpret the Sherman Act. I think when you approach the case in that frame of mind, it does not fall in its proper place in relation to the other cases which construe the Act. The court has frequently laid down the proposition in broad, unqualified terms, that any price-fixing arrangement of any kind is illegal per se. Questions of reasonableness have nothing to do with it. The last time it laid that principle down was in the Socony Vacuum case a year ago. There are some limited and narrow exceptions to the rule. One is the old Chicago Board of Trade case. That situation is not involved here in any way. Another limited and narrow exception is the General Electric case and I view a case as being just that narrow and limited exception. When you talk about competition as the defendants do here you exceed the narrow facts involved—you run into the broad rule—and I urge with great earnestness that that is what they are trying to persuade your Honor to do in this case.

864 Now I am going to argue that is an additional ground for a differentiation between these cases that is, between this case and the General Electric case. In the General Electric case, the

General Electric Company, as far as the record shows, and as I think probably was the fact, owned all of the dominant patents.

The COURT. Is there anything to indicate that those patents were adjudicated?

Mr. COX. Yes; I think they had been adjudicated.

The COURT. Then what is the distinction on that ground? I understand Masonite owned all of the claims in this particular Masonite patent.

Mr. COX. It owns the patent which I understand controls the entire field, but there is this distinction, and that is at least two other agents own patents; one of those agents, I grant you, has lost finally for the purposes of this case, first process of the Masonite was valid, and second Celotex process did infringe. The other defendant, however, Insulite, has never had an adjudication as to those patents. In that case there is this licensing agreement which exists today, under which Insulite licenses Masonite under the patents which it owns and controls with respect to artificial wood and processes for making it.

The point I want to make is this, and I grant that perhaps it is a narrow kind of distinction between this case and the G. E. case, but I think there is some substance in it. In the G. E. case the agency agreement had not been set up as a result of any composition or settlement of conflicting patent claims. In this case I think you can see that the del credere agreements have been set up at least between Masonite and Celotex, and Insulite as a compromise between conflicting claims.

Of course, people can settle their patent claims and compromise them without violating the anti-trust law. The
865 Supreme Court has indicated in a number of cases, however, whether they settle their patent differences by cross licensing or by pooling or any arrangement of that kind, they cannot use that occasion to set up some kind of price-fixing arrangement. That is the kind of thing which the Supreme Court struck down in the old Standard Sanitary case and in the Oil Cracking case, in which the Supreme Court said, although they had pooled their patents and had cross-licensing agreements, it was not illegal because they had not tried to fix prices.

I suggest here, although there had been a decision adverse to one party, they then got together, composed their conflicting claims and compromised them, but they cannot do it by cross-licensing or pooling, or even by means of true agencies, so as to set up a price-fixing relationship. If they do that, they run into the rule laid down in the two patent cases I have mentioned.

I think, in the interest of brevity, I had better go along and deal with my second point under Section 1, that these contracts had not been and are not now true agency agreements.

I propose first to discuss the 1933 and the 1936 agreements; collectively, the defendants assert of course now that these agreements have been cancelled by the new agreements which were made four weeks ago.

Without taking any position on that, I want to say that it is our view that these old agreements are still very much in the case and I submit they are in the case for two reasons. In the first place, they are not true agency arrangements, and therefore are illegal because they were a kind of price-fixing arrangement which is not permissible under the law. Despite the fact that a new agreement has been entered into, I think we are entitled in this case, under the decisions, to a decree which enjoins any performance under the old contracts and the execution of any con-
866 tracts like the old contracts. I cited the cases in my first brief which deal with that point and I am not going to say anything more about that.

In the second place, we think these old contracts are very much in the case because I think the nature of the new agreement can best be judged in the light of what has gone before. As to those 1933 and 1934 agreements, we submit on their face they show they are not true agency agreements. We think the defendants in effect have conceded that.

Mr. Alexander yesterday testified the only reason that they changed them was because of this litigation, and I think undoubtedly it can be assumed that they were satisfactory as business arrangements, that is, the parties would get along all right with them.

Now that was their position. I think that it is indeed a sound one, because when you look at those contracts, taking the 1936 contract particularly as an example, and compare it with the contracts which were upheld in the General Electric case, it becomes perfectly clear that they were not agency contracts. I would just like to indicate, as briefly as I can, the number of respects in which the contracts, the old contracts here and the contracts in the G. E. case differ, because I think it throws some light on the real nature of those arrangements.

In the G. E. case the General Electric Company determined the size and the type and the class and the quantity of the lamps, and the length that they were to remain in stock. Under these agreements the Masonite Company left the control of stock entirely up to the so-called factor, and it merely agreed to make available hardboard in such quantities as the factors might require.

In the G. E. case the General Electric Company reserved to itself the right to recall all or any part of the consigned stock during the life of the agency agreement. Under the old agree-

ments in this case Masonite was not entitled to recall the hardboard at all, except upon cancellation.

867 In the G. E. case the agent paid for distribution, cartage and storage upon delivery of the lamps to the warehouse, but General Electric bore the cost of transportation from the factory to the warehouse. Under the old contracts in this case the so-called agents bore all the transportation and storage and cartage charges from the time the hardboard was placed on the cars at the door of the Masonite factory.

In the G. E. case the principal assumed all the risks of fire, flood and carried whatever insurance had to be carried on the stock which was in the hands of its agents. In this case under the old agreements the factor procured insurance at his own expense, and was required by the contract to carry adequate insurance. In the G. E. case the G. E. Company possessed or paid whatever taxes were assessed against the consigned stock. In this case the factors paid whatever taxes assessed against the stock.

In the G. E. case all the lamps were advertised and sold under General Electric's trade marks and trade names. We have heard the testimony in this case that the hardboard was sold by the factors under their won trade marks and their own trade names, and indeed the agreement prevented the factors from using Masonite's trade name. While there were some instances and the record will show what they were, in which disclosure was made that the hardboard was manufactured by Masonite, and indeed in the case of one company I believe there was an actual disclosure that the company was an agent for Masonite, generally speaking this hardboard was sold by the agents under their own names, without any widespread disclosure that they were acting as agents.

Under the G. E. case the agents were not obligated for any money until the lamps had been sold. In this case, under the 1936 contract, the so-called factors were required to pay to

868 Masonite 20 days after the end of the month in which the board had been sold, but they were required to pay whether they had received payment at that time under the contract from the purchasers or not. That point is of some significance, because under the terms and conditions of sale the factor could give his purchaser 60 days in which to pay. So the contract clearly contemplated the situation that the factor would pay before he received any money from the purchase.

Under the 1933 contract, and up until 1936, the factors paid one-half of the amount due on the hardboard 20 days after the month in which the hardboard was received, irrespective of whether they had sold the hardboard.

The COURT. Were there any discounts on those prices under the 1933 agreement?

Mr. COX. You mean a discount given by the agent to its purchaser?

The COURT. No, by Masonite to the agent.

Mr. COX. Yes, there was a discount, in this sense, under all the contracts, as I understand it. The agent paid Masonite on the basis of the carlot price, but he sold hardboard, some of it at least, on the basis of less than a carlot price, which was somewhat higher, and he kept the difference. There was that kind of discount. The commission under all the contracts was computed at a percentage of the carlot price.

The COURT. But you said, as I understood you, that under this del credere arrangement the agent was required to make payment for the merchandise within 20 days after it was shipped from Masonite. Is that right?

Mr. COX. That is correct.

The COURT. Now if they paid in 2 days or 5 days would they get any discount?

Mr. COX. I understand not. The agent paid 20 days
869 after the month in which it was sold, under the 1936 contract, and paid half of it as it was received under the 1933 contract.

Mr. DALLSTREAM. He made an advance.

Mr. TUTTLE. In the General Electric case they had to pay in ten days.

Mr. COX. But there was no discount, as I understand it, for prompt payment.

Mr. QUARLES. Between the agent and principal, no.

Mr. COX. There was no discount.

In the General Electric case there was no attempt by the principal to shift any liability for any tortious acts on the part of its agent. In this case the factor agreed to indemnify the Masonite Company against all damages resulting from injury to persons or property which arose out of the handling by the factor of hardboard.

In the G. E. case there was no warranty given by G. E. as far as contracts show, as to the quality of the product. In this case Masonite warranted to its factors that all the hardboard products shipped were good and workmanlike products.

Finally, there is quite a difference throughout a large part of the life of these contracts between the obligations of the agents as to property which they own. The General Electric Company did not require the agents to acquire and pay for any property which belonged to the principal, nor did it attempt to control any use of property after title had obviously passed to

the agent. In this case the contracts made rather elaborate provisions for dealing with what were called "shorts" and "longs." Those were boards which were cut out of the standard size board, which was a 4 x 12 board. For example, if the agent ordered a long, which would be a part of a standard sized board which was less than 12—that is, a length less than 12 x 4—an 8 x 4 or longer—he had to pay at the same time or on the same
870 terms for that resulting "short," and I assume that that "short" then became his property, since he paid for it. Nevertheless, in selling that "short" to the building trades he had to preserve the prices, terms, and conditions of sale set by Masonite. The contract required him to.

In the case of two "longs," two boards cut out of a normal sized board, if he bought one he was required to pay for both of them at the time he got or sold the first, as the case may be, and in selling the second one, which it is pretty clear he acquired, he would still be required to comply with the terms and conditions of sale set by Masonite. Nothing like that in the G. E. contract. Those particular provisions were eliminated from the 1936 contract, I might say in passing, prior to the execution of the 1941 agreements. I think they were eliminated some time in 1940, after this suit had been instituted.

That is a rather detailed statement as to some of the differences which existed between the defendants in this case, and which do exist between the defendants in this case and the agents in the G. E. case.

But I want to go back at this point to the thing I said a little earlier in a colloquy with your Honor about the position of the agents in the G. E. case viewed in a somewhat broader sense. I said then, and I again call it to your Honor's attention, that they were people, the record shows, who were engaged primarily in the business of distributing electrical appliances in particular localities. There were 25,000 of them. They were obviously acting purely in a distributive way. That was their business. They didn't have any other business. There is nothing incongruous in my mind in regarding those people as acting in a real sense as agents or instrumentalities or even as servants of the General Electric Company. But I find a great difference in fact, whatever legal consequence it may have, there
871 certainly is a difference in fact between those agents and these del credere agents in this case. These are large companies, engaged in many other enterprises, in a number of enterprises, manufacturing building materials, most of them manufacturing insulation board, or selling insulation board, conducting large organizations, and carrying on this hardboard business

is only a part, and in some cases they state a very small part of the rest of their activity.

In carrying it on under the 1936 agreements, I think, quite apart from the details which I have mentioned, it is perfectly clear that they were carrying it on, except as to prices, in quite an independent way. They had control of their own selling policies, of their own advertising, of their own salesmen, and they determined how much time they should devote to selling hardboards. They were not, it seems to me, in any real sense simply instrumentalities or agents or servants of Masonite Company. It may be that under the agreement for some purposes it might have been said that Masonite was responsible for their acts, but what I am suggesting now is that if we are going to apply the limited exception that is made in the General Electric case to this situation it ought to be applied with an eye to all of the economic and business differences which exist between the two cases.

The COURT. I don't follow you at all on that argument. If you are trying to draw a distinction between the corporation because it is a corporation, or because it may have been successful and become large, and a small distributing agent which happens to be an individual, I don't think that as far as the law is concerned that argument will get very far. This is not a political argument. This is not a case of the functional approach, either.

Mr. COX. I am not referring to any functional approach.

The COURT. I never did know what that was.

872 Mr. COX. The point I am making is that no matter how you describe it it seems to me the facts establish that the nature of the control is quite different in the two cases.

The COURT. You pointed out some things which challenge discussion as to differences between the two cases. I don't know, it may very well be that in this case there is something which is called an agency but in reality it is not so. That is something that I can understand and we can argue, but when you get into the realm of politics and economics I don't know that that has anything to do with a case in the Federal court.

Mr. COX. I didn't intend to make any political argument, your Honor, but I plead guilty to the charge of arguing economics. I think in a situation like this you have to argue economics, your Honor. I am not making any argument about size as being something awful. I am not making a political argument.

The COURT. I have got just as tender a regard as you have for the Forgotten Man, but I don't think it necessarily has anything to do with the issues in this case.

Mr. COX. I haven't said anything about the Forgotten Man.

The COURT. I did mention it.

Mr. Cox. I regret that you did, because it creates the inference that I have been.

My point is this: we are talking about the principal controlling the agent, that is all. As I say, it seems to me that the notion that there is the kind of control which exists between principal and agent is a notion that I can accept more easily as to the General Electric agents than I can as to these other defendants, not because their size is evil, or anything of that kind, but simply because they are themselves. They are organizations which it would seem difficult for me to imagine Masonite controlling
873 the way you would an agent. They have their own selling forces, they have their own agents to carry on activities in an independent way.

So much for the earlier agreements. Now I want to say something about the later agreements, the 1941 agreements, because there is no doubt that they changed a great many of the incidents which I have just referred to as distinguishing this case from the General Electric case. It is perfectly clear that so far as they could the defendants have attempted to bring these contracts within the scope of the General Electric case. In the first place, the incidents as to taxes and insurance, and in part as to freight, under the new contracts have been shifted from the factors to Masonite. I say only in part as to the freight, because the agent is under an obligation, as I read the contract, to remit when it receives payment, to Masonite the freight which Masonite has paid from its factory to the warehouse or to the ultimate point of sale.

The Court. You mean from the Masonite plant to the factory of the agent?

Mr. Cox. Yes. The compensation schedule provides that the agent will also remit to the manufacturer an amount equal to the freight payments made by the manufacturer on account of products so sold covering the original shipment of such products from manufacturer's plant for such consignment stocks. That appears in the compensation schedule of the contract.

The Court. Well, what are these taxes that you speak about? Are they personal property taxes on the board itself?

Mr. Cox. I suppose they might be in some States. There is no specification.

The Court. When they speak in these contracts of taxes they do not refer to franchise taxes or license taxes or things of that kind, do they?

Mr. Cox. No; it is taxes, as I understand it, which apply
874 one way or the other to the board itself. That is at least my conception of the language in the contract.

The provisions of the contract also make changes with respect

to the marking of the board, and now require the agents to put Masonite's name on the board.

The COURT. What for?

Mr. COX. It states that all hardboard products of the manufacturer which agent is authorized to sell may be labeled with the agent's trade mark or trade name, provided the labels clearly disclose that with respect thereto agent is acting solely as agent for the manufacturer.

The new contract also provides that in the warehouses the board shall be segregated, and signs shall be posted saying that it is the property of Masonite, a provision which was not contained in the earlier agreements.

The COURT. How about the insurance?

Mr. COX. I said that they shifted the burden of the insurance so that Masonite now pays for the insurance and takes out the policy.

There are certain respects, however, in which the contracts remain unchanged, or at least do not change substantially the relationship which existed theretofore. I mentioned the matter of freight. Another change is in connection with the payment, although there again I think that in some respects the situation is still unlike the General Electric case. The agent now is required to pay in a certain period of time after the end of each month only the amounts he received in that preceding month. But he is required to guarantee and to assume the responsibility for the payment of all amounts which are due on sales of hardboard, so that it appears that he still in one sense assumes the financial responsibility.

The COURT. That was true in the General Electric case.

Mr. COX. I don't believe it was. It is not my impression that it was, but I will check on that.

875 Mr. DALLSTREAM. No question about that.

The COURT. Well, they use those words "del credere agents."

Mr. LAMB. They use the very terms.

Mr. COX. I prefer to refresh my recollection on that. There is still no control by Masonite in any appreciable degree as to the nature of the stock which the agent shall keep on hand. He is free to keep any hardboard or as much of it on hand as he likes. Of course the rate of commission depends on how much he sells, but there is no requirement that he keep any particular stock or any particular kinds.

The COURT. I don't think that would be of any importance, anyway, would it? Certainly you would not ask an agent to go ahead and keep a lot of stock if he had no ability to dispose of it.

Mr. Cox. My only point about that is that in the G. E. case the company did impose certain requirements on the agents as to the nature and extent and quality of the stock.

The agents still are under the 1941 contract obliged to hold Masonite harmless against all negligent acts of the agents or its employees, a provision which seems to me in a way just reverses the usual relationship existing between a principal and agent.

The COURT. Would Masonite be liable for torts?

Mr. COX. To third persons. Yes, to third persons. That is the purpose of this provision, to make the agent pay Masonite if it has to pay third persons for something that is done, negligent acts.

The COURT. If one of the boards was negligently allowed to drop off the pile in the agent's possession would Masonite be liable for that tort as the master, not as the principal? I don't know. I hope I don't have to struggle with that question in the jury part.

Mr. COX. It seems to me we might get into a number of difficulties.

876 The COURT. When is a principal not a principal, and when is he a master?

Mr. COX. A number of difficulties as to whether there was an independent contractor, and what the situation was.

The COURT. I will let you think up all those knotty problems when, as and if.

Mr. COX. That is a question I would prefer not to have to answer, but I understand the purpose of this provision is to indemnify, as I have been saying, Masonite in the event that a negligent act of the agent does impose any liability upon it in any way.

Under this contract the agent still remits on the basis of car lot price, although he may sell some of that hardboard on the basis of a higher than car lot price, and he takes the difference. It seems to me that that may suggest in some ways that it is more like a purchase and sale than it is like an agency agreement where the purchaser is buying at a quantity rate or at a wholesale or jobbing rate, and selling, at least to someone who had purchased stock, at a somewhat higher rate or a retail rate.

Further, and finally, I point this out as to these 1941 contracts, except as to the things I have mentioned, that is the marking, the requirement that if they put a trade mark on it of their own they must say they are Masonite's agent, the requirement as to putting signs on the stock in warehouses. This contract does not in any way control or limit the action of the agents in selling, conducting their own marketing policies, controlling their own salesmen and their own organization. In other words, I think

that so far as the sales are concerned, except for such change as may be involved in the marking provision, that these del credere agents are independent commercially, in much the same way that they were independent commercially before the 1941
877 agreement was made. Now I grant that the agreement, as I said a moment ago, is much different, different in a number of respects, from the 1936 agreement, but it still seems to me that essentially these people are taking this hardboard in much the same way as they would if they were purchasers. There are some differences. If they were purchasers they might not put the marks on it. That I think is probably the most important change.

Another change, of course, is if they were purchasers they would not put the signs on in the warehouse. But so far as the actual handling and selling and distributing of this hardboard, they behave just about the same way, it seems to me, in this contract, as United States Gypsum behaved when it bought hardboard from Masonite and sold it to the trade. The degree of control, so far as their control in this contract is concerned, seems to me to be largely directed to two things. Those are the two things which we specifically object to, and that is the price at which they shall sell, and the class of customers to whom they shall sell.

The COURT. The class of customer? What does that mean?

Mr. COX. Well, the contract provides in Section 2 that the agent is authorized to sell to the following classes of buyers: wholesalers, retail lumber dealers, and reserve supply companies. Those are the co-operatives about which we have had testimony—something like a co-operative. And it also provides that the agent may also sell direct to the United States Government, or any official department thereof. What they have cut out is that industrial field in which the hardboard is used for purposes different from those used in the building field.

The COURT. Do I understand you to intimate that if you could get together on those two items you would have no complaint?

Mr. COX. That is quite right.

878 The COURT. Suppose they eliminated all questions of price entirely from this agreement?

Mr. COX. I think if they eliminated all questions of price——

The COURT. You would fade out of the picture?

Mr. COX. I would fade out of the picture.

The COURT. There may be something in that. We might take a recess and you can talk it over.

Mr. COX. Well, I don't have any hope.

The COURT. That might be a hopeful solution of the problem.

I don't know. Without knowing anything about it at all I shouldn't think it would be difficult——

Mr. Cox. That is the only point of difference between us, so far as I am concerned.

(Short recess.)

I think I should call your Honor's attention to some things in the argument which escaped me in this somewhat hasty summation and which refer to the new 1941 contract.

Your Honor will recall that I made some reference to the provisions of the contract so far as they required the agent or rather which the agent was required to maintain. In section 5 of the 1941 contract there is a provision agreeing substantially as follows: the manufacturer shall maintain at such agent's plants and warehouses as the agent may designate consignment stock of hardboard products, the quantity of which in so far as practicable, shall approximate two months' estimated deliveries on sales made by the agent on consignment stock.

I don't know whether that provision can be construed as a Masonite obligation on the agent to take two months' estimated deliveries, or whether it simply imposes an obligation on
879 the manufacturer or Masonite to maintain those stocks for the agent if the agent wants them or if the provision is predicated on the obligation of Masonite and not on the agent.

I should also like to call your attention to the fact that the contract contains a representation of quality by Masonite and the so-called agent, the representation being that the hardboard delivered to them shall be of the same grade and quality currently offered for sale by Masonite itself. As bearing on the question which your Honor raised as to the responsibility of Masonite for the acts of the agent, I should point out that Section 22 provides specifically that nothing in the agreement or the performance thereunder or the making of sales shall constitute or be construed as constituting any person employed by an agent, an employee or manufacturer, for any purpose whatsoever.

I was about, when we adjourned, to point out to your Honor that the thing which we objected to in these contracts and the only thing was the price provision. An agency contract is not objectionable under the anti-trust laws merely because it is an agency contract; even the control of agents in a number of respects is obviously unobjectionable and cannot be criticized under the law. The things we are attacking, and attacking primarily here, are the provisions which control the price at which the agents sell, at the same time putting those limitations upon as competitive power of Masonite so far as concerns its own prices.

That is the only part of the contract that we are really attacking, and we would be satisfied by way of a decree where the decree would simply eliminate those provisions in the contract. So far as we are concerned, it is not necessary to strike down the whole arrangement, and I should like to point out to your Honor that those price provisions are apparently of interest only to Masonite.

880 If you will recall, Mr. Dallstream stated——

The COURT. I am not at all clear from the testimony whether there is any great deal of it to anybody.

Mr. COX. It may not be. Perhaps to put it in another way, Masonite, as far as I can determine, is the defendant who is most strenuously insisting upon it in the contract.

The COURT. I should think its interest would require both sides to maintain the same price.

Mr. COX. I am speaking of all price provisions. I am not speaking only of Masonite.

The COURT. If Masonite had a price of forty dollars for a certain kind of hardboard and were selling it, as apparently it is, in competition, to use your term, with a selling agent, I should think that the agents would want to have that same price maintained in their sales, and vice versa.

Mr. COX. I think that is probably the thing that would happen. Of course our point is, your Honor, it would eliminate the price which——

The COURT. Where you have got a small group of defendants or agents, all of whom are concerns of substantial standing and presumably of high integrity, as I suppose is the case here——

Mr. COX. I suppose there has been no suggestion to the contrary, your Honor, in my argument or in the evidence. It certainly was not intended and there has been no suggestion of that kind.

The COURT. I suppose in the 1941 agreement there are also provisions for cancellations if the agents did anything, even capriciously.

The COURT. Necessarily, I suppose, in the 1941 agreement there are all sorts of provisions for cancellation at a moment's notice.

Mr. COX. Oh, yes.

881 The COURT. If any one of the agents did anything that is capricious.

Mr. COX. Yes; they could cancel the agreement on notice, on 90 days' notice, under this provision.

I was about to say that our point as to the proposition of cancelling the price provisions was not so much to cancelling the provisions which required Masonite to adhere to the same price as agents charge as it is this, that if you took out of the contract

the provisions by which Masonite set the price at which the agents will sell, then thereafter, although the price at which Masonite sold would probably be the same as its agent, but the level of that price would be determined by the competitive activities of the various companies. In other words, one of them would sell at any price he thought he could sell, and the others presumably would meet that price, including Masonite.

I was about to point out that it is at least apparent from Mr. Dallstream's opening statement and from Mr. Dahlberg's testimony that The Celotex Company is not interested in this price provision in the contract, that all that company wants is to get hardboard, and I suspect that is true of the rest of the defendants. Their statements that they filed, most of them, assert that the price provisions were not put in at their suggestion or on their insistence, but are provisions which were put in the contract because Masonite would not deal with them otherwise.

The final point I wish to make is this: It may be that your Honor will conclude that my first point, which is that this arrangement is illegal because it is between competitors and because of the other circumstances I have pointed out, even though it is a true agency, is unsound. It may also be, however that your Honor will conclude that as to the 1933 and 1936 contracts, those contracts were not in fact true agency agreements, any per-
882 formance or execution or repetition of those agreements should be enjoined. You might at the same time, I assume, reach the conclusion that the 1941 contract, although I hope you do not, is a true agency agreement. The question will then arise as to what kind of relief the Government should have. I want to suggest at this time that if that is your Honor's disposition of the matter, that effective relief to the Government should enjoin the use—at least the use—of those price provisions in all the agreements made, not only in 1933 and 1936 but also 1941.

I make that suggestion largely and, I might say, entirely on the basis of the decision in the Ethyl Gasoline gas, which came up from this district.

As your Honor may recall, in that case an attack was made on some patent licenses. There was no attack on the patents. The validity of the patents had to be assumed. The District Court here, however, found that the patent license agreements had been used for an improper purpose; that is to say, they had been used to control the prices at which jobbers of gasoline sold the gasoline which they had bought from the refiner. There was no doubt that the power to grant the licenses existed and that it would have been perfectly proper for the Ethyl Corporation to exercise that power. If it had been used in the first place without attempting to control prices, I have no doubt that no court sitting anywhere

would have enjoined the use of those jobber licenses. The District Court here, however, after determining that the jobber licenses had been used for the purpose of controlling the jobber prices, took the view that although jobber licenses might be used for a proper purpose, nevertheless enjoined the performance under those licenses and directed that they be cancelled. That decision was affirmed by the Supreme Court.

883 The ground on which the District Court here did that, as I understand its decision, was that effective relief as to the price matter could only be granted to the Government by an injunction against all of the license provisions. I suggest that here effective relief against these price provisions can only be given to us if the injunction runs against the price provisions or their enforcement in all of these contracts, because if your Honor should decide that the 1941 contract is a true agency contract, then the legality from this time on of what defendants do as to price is going to depend on whether at any one time they ever step over that line which separates an agency from a sale. That is going to require a continuous policing operation.

These price provisions are not of interest to anyone but Masonite. In the circumstances, it seems to me on the equities and in the interest of giving effective relief, that the decree should enjoin the enforcement of all price provisions in all of the contracts.

The COURT. Well, you are making no contention in this case that if there is a valid agency agreement, then that the price fixing goes beyond the agency, are you?

Mr. COX. Well, I am making the contention now that if this 1941 agreement is a valid agency agreement, that in view of the 1933 and 1936 agreements and in view of the situation as to the price provision, that at least in the 1941 agreement it should be enjoined just as in the Ethyl case.

The COURT. Of course, in the Ethyl case, there was a complicated structure worked out which made the price-fixing arrangement permeate the whole set-up, as I remember it.

Mr. COX. Yes, but there, your Honor, the price-fixing could have been eliminated without touching the jobber licenses; it

884 could have been possible to do it because there was nothing in those licenses in fact which bore directly on price-fixing at all. It was simply the use which had been made of them in one sense to fix the price. I grant you the analogy between the two cases is not precise, but I think it is close enough.

The COURT. No; I don't think, as I remember that case, and I remember studying it quite carefully at one time, it seemed to me that there was a tremendous amount of machinery which was set up not only for the purpose of controlling the price to the persons

who were licensed but also to control it after it passed out of their hands altogether.

Mr. Cox. Yes; but the jobbers whose prices they were seeking to control were licensed, your Honor; they were licensed by the Ethyl Corporation under an ordinary patent license agreement. The charge was, however, that they could not control the price of gasoline in the jobbers' hands.

Of course there the contract did not seem quite as complicated, in some ways, to me, as this one here. I suppose it is a matter of judgment. But the action of the Court in granting relief, it seems to me at least rather tends to support the idea that when you have this kind of tampering with prices, to use the words of the Supreme Court, that at least that part of the arrangement should be enjoined.

885 *Defendants' summation*

Mr. TUTTLE. May it please the Court, the charge, and the only charge, on which we are here at this bar, is one of conspiracy—conspiracy to violate Sections 1 and 2 of the Sherman Law.

The scope of Mr. Cox's argument has been such that I feel, taking it by and large, it involves at least implicitly if not explicitly certain unusual contentions which perhaps do represent a rather new philosophy and approach to what heretofore have been regarded as well-settled principles of law.

In the first place, I detect an attempt to modify or restrict the ancient boundaries of the Patent Law and the property rights that it creates by a new use of the Sherman Law.

In the second place, this phraseology which is constantly used by him of "The existence of potential competitors" and "potential competition," which were suppressed by us in some way rest, I think, on analysis, on the proposition that third parties are not bound on the principle of res adjudicata and by the decision of the Circuit Court of Appeals, and that therefore they were free to buck that decision, notwithstanding the other principle, equally well settled, of stare decisis, and that therefore this in some way discouraged third parties from attempting fresh litigation with us as to the only product that is the subject of any agreement here whatever, to wit our hardboard under our patents.

And, in the third place, I do detect a suggestion which does have its roots in so-called modern philosophy of economics, much discussed these days, that size has some condemning effect per se.

In other words, in this case we, of course, Mr. Cox will concede, can have agents, we can have licensees, too, just
886 as we can have dealers and wholesalers; but, he says, we must not have as salesmen those who, in turn, are large and those who, in turn, make good salesmen, effective salesmen,

over a wide area; we must confine ourselves to the small potatoes in the business.

I say that those are new and, perhaps, almost startling concepts, but it seems to me that they are at the root of the philosophy which this prosecution represents.

Now I said that we are here solely on a charge of conspiracy. Notwithstanding the concession which still echoes in the room, by Mr. Cox, that these people are all of high integrity and that he makes no charge of moral turpitude.

That being so, let us turn for a moment to see the analysis, to the complaint. Pleadings are easy. Proof is a different proposition. And I don't think that I can present our case better than to ask your Honor at this poit to analyze the allegations in this complaint against the record as it now stands, because I think that will bring up the issues, such as are important, if there remain any at all, in the sharpest relief.

Now, the complaint is precise on one thing, and that is the birthday of this conspiracy. It writes it down in the baptismal records of the anti-trust division. It says that this child was born on October 10, 1933 through the unholy wedlock of only two people, one The Celotex Corporation and the other the Masonite Corporation. Nobody else was involved in the birth of this conspiracy. And it occurred precisely on October 10, 1933. And I have been waiting for Mr. Cox to answer the query which seems to me to lurk in the whole atmosphere of this case, that if he has failed to prove that there was any such child obrn on October 10, 1933, then when any such child as he alleges ever came into being.

We are dealing here with an entirely imaginary existence that never came into the realities of this world. He says on
887 October 10, 1933, in this complaint, the defendants Masonite and Celotex entered into a conspiracy. And then note this concession in the complaint, and one which I think has been forced by the proof that we have had here—that nobody else was in at our conspiracy at the time, but that subsequent to October 10, 1933 the other defendants joined the conspiracy. The significance is obvious. They did not make a conspiracy. They joined it, and it was because the conspiracy was already in existence that their subsequent joinder makes them defendants in this action. So that the primary question remains, was there a conspiracy in existence at the time they are alleged to have joined it? Because if there wasn't, then by the very terms of this complaint the whole proposition falls to the ground.

Now looking at it from that angle, of course we have the testimony beyond all question, and even if we did not have the testimony, the findings would have to be the same, because I take it

that the burden of proof in this case is on the Government, they have to prove the elements that make up this conspiracy; we don't have to disprove. But certainly there is nothing in this proof here that negatives the allegation and concession of the complaint itself, that on October 10th only two persons were in generation of a conspiracy. There is no proof here that at that time there was any group bargaining so far as these defendants were concerned, all of them as a whole, that they sat down around the table and agreed on a plan or concert of action or combination. As the complaint says, they came along later.

Now, of course, we have the uncontradicted testimony of Mr. Dahlberg that he had no idea on October 10th that there ever would be any other corporation coming into the picture whatever as agents. He said he was not assured that there would not be, but at the same time he was not told that there would be, and that he did not make his commitments on that day on the assumption that there would be.

888 Consequently, this is not a case where, on a given day, the Government can find a lot of people in a smoke-filled room with bleary eyes trying to fix up some kind of plan to ravish the public in the matter of high prices. That is not the case.

Now what does the Government say in its complaint as to what were the illegal purposes of this conspiracy?

The next paragraph is Paragraph 41, and it catalogues them. So that there can be no doubt about it, and to offset the necessity for any motion for a bill of particulars, it says that the conspiracy was made with a view to doing six things: (1) avoiding the possibility of a final determination by the United States Supreme Court as to whether Celotex had infringed Masonite's patent. That is a new one on us, so far as an evil purpose under the interstate commerce clauses of the Constitution are concerned, or the anti-trust law which gives it expression? It was said that it is good realistic advice and it is a good thing to agree with your adversary at times, but it is indeed new philosophy that that advice has become an implication of crime under the anti-trust law. The Sherman Law does not compel litigation, and no court has at any time intimated that it does. I need not enter on a speculation as to what the chances are in the Supreme Court of the United States because every lawyer can have his percentage of chances estimated to suit his own experience or his predilection—one in a million it was testified here, down to one in ten or more, but certainly that cannot be an illegal purpose.

Next, the B purpose, is stated to be the elimination of further competition on hardboard, spelled as one word, hardboard, between Masonite and Celotex—hardboard spelled as one word and pronounced in one breath.

On October 10, 1933, Masonite Corporation did not need any agreement or conspiracy to accomplish just that. That
889 had been done for it by the Circuit Court of Appeals. It was not the combination or conspiracy that eliminated further price competition on hardboard but, to-wit, the patented article of the Masonite Corporation, and the Circuit Court of Appeals which gave vitality and effect to the legal monopoly which that patent represented in that product.

The C evil is this: the discontinuance by Celotex of the production of hardboard or products competitive with hardboard. That is a double statement. I would like to comment on each portion.

The discontinuance by Celotex of production of hardboard, was not the result on October 10, 1933 of any conspiracy, it was the result of the injunction which the Circuit Court of Appeals had granted two months before and which would be expressed necessarily in a judgment upon its mandate. From that point on, Celotex would be liable not only because of the damage in the products clause of the patent law, but because of the injunctive clause of the decree which would come into existence and which contained precisely that injunction.

As to the other portion of the third or C clause, it says: Discontinuance by Celotex of products competitive with hardboard.

That has been thoroughly disproved. Celotex has not discontinued a single product competitive with hardboard and it has not surrendered the right to create new products competitive with hardboard and not one of these agents has done so. They all went on with their busineses just the same as they had before, with the one exception that they got an additional product which they could sell and market. So instead of giving up products which they could sell and market, they got more than they had before, and, consequently, as your Honor just remarked to Mr. Dallstream, and as you will see from the stipulations, many others have been added; there have been a great many additional products which would be competitive with hardboard or products
890 which when this patent obligingly expires in 1945, can be used to duplicate hardboard.

Now if there had been a conspiracy to affect competition under the Sherman Law, that conspiracy would have manifested itself in two things, one, it would have affected other products than the particular product described here, and made under this patent. It did not. There isn't a clause in any one of these agreements that in any way affects the rights of these agents in all of the Western world to deal in any products that they see fit to deal in and to manufacture and distribute, provided it does not happen to be what the Circuit Court of Appeals describes as "synthetic wood."

Furthermore, I say that would be one of the chief indicia which would have appeared here as a conspiracy. The other would have been that the Masonite Corporation would have undertaken to tie up this situation beyond the date of the expiration of its patent or at least beyond the date when these agents could get out of this agreement by a six-months' cancellation clause.

I cannot imagine a conspiracy which can be dissolved by anybody on six months' notice and which in the meanwhile does not restrain research, does not restrain preparation to supply a duplicated process or product or which does not undertake in any way to restrain the field of activity in which those alleged conspirators can carry on their normal business.

So I pass to the foruth evil result which was supposed to be accomplished on October 10th, the D evil, namely, restriction of Celotex's sales of hardboard to the building trade.

I need not emphasize the fact that that was our right under the patent. We had a right to keep it to ourselves, even if economic conditions had not been sound. Even if the reason had not been justifiable in the public interest, we had a perfect
891 right to keep for ourselves a portion of the field under our patent for our patented product. That is exactly what the General Electric case—that great, huge concern, did, as set forth here; it kept to itself the right to sell directly and exclusively to the big people in the business, something which we did not.

Again I say, the whole theory of this complaint is that in some way there has been made in the year 1940 a discovery by new philosophers sweeping the heavens with their telescopes to find new stars, that the Sherman Law modifies the patent law and in some way destroys the general property rights which, in this country and all other countries, the patent laws protect for obvious public purposes.

Now I come to the fifth evil which was said to have been spawned on October 10, 1933, the E evil:

An increase in Masonite's volume of production. Think of that. At last under the Sherman Law an increase in the volume of production has become an offense against that law. I don't know which way the Government is going on this subject of production, and I don't know that anybody else knows, so far as the Sherman Law is concerned. I have heretofore understood that restriction of production was the essence of the offense, but as I say, a new star has been found in the heavens and now an increase in Masonite's volume of production has become a statutory offense.

It is true it adds the utilization of Celotex's extensive selling organization. There is the element of size. Certainly if we had increased our production, also the utilization of small agencies, I

suppose the Sherman Act would not have been mentioned. That was a statutory offense. The agency by which the increased production was accomplished was an extensive organization. Here we have that philosophy, so widely fought in days past if not on this particular date, because of other changes, that philosophy which has been so impregnated in the American people, that

892 we must be afraid of big business because it is big. It is an evil which the Sherman Law, notwithstanding it says nothing about bigness or smallness, must be invoked to overcome. That is number six.

Now we come to number seven, the F evil, that on October 10, 1933, for the first time, and this of course is the climax—this is the supreme economic evil of certain political philosophers—the F evil, increased profits of Masonite and Celotex as a result of an increased margin between cost and selling price. The increase of profits, that is the evil which is condemned by the Sherman Law. The Sherman Law is but a one-way street for profits. It is downward, and the red lights are against any movement in any other direction.

But even if we accept the philosophy as a true interpretation of something inherent, yet not openly acknowledged in the Sherman Law, how do we square it with the record we have got now? It says, increased profits to Masonite and Celotex as a result of an increased margin between cost and selling price. How woefully proof of that allegation has failed. Increased margin between cost and selling price. On the contrary, the very stipulations which are put in evidence, the very charts and diagrams which are set forth before your Honor, show that whatever may have happened to other building industries' materials, whatever may have happened in other lines of manufacture, the situation so far as this hardboard is concerned is astounding in its contradiction of all those economic forces which have been putting up, as I think the Court can almost take judicial notice, the cost of building material to a towering degree.

There was attached to our stipulation the other day SS-8, which shows since 1931, the progressive cost to us of labor and the progressive cost to us of material—and yet the fact that we are

893 guilty still of being able to operate at a profit, a profit which is necessarily the result of the mass production which we secured and which has been carried on for the benefit not only of ourselves, but more particularly the public, because it has been stated on the witness stand, the philosophy which has been behind the management of this company has been exactly the philosophy which has been behind the management of all productive industry. And we have here in these charts—I know your Honor has not yet seen them, but you will—in the first

place, as to the mass production in SS–4, you will note the gigantic increase in the spread through our own sales, which have risen, and through the del credere sales which have risen since 1933 up to the present time, and the graph shows a still steep ascent. And then you will see from SS–1 and SS–2, the fact that our prices, unlike—and if it could be proven it would have been proven by the Government—unlike the building trade costs these days and building material costs these days, have remained practically on a steady line from 1932 to 1940 in the five different products which constitute our chief kinds of hardboard which we make as synthetic wood. So that when we examine these five evils, they either rest on fallacy of law or they have been completely non-proven, and indeed disproven.

Now I say again, therefore, that this complaint makes no other accusation against any of the other defendants. They are said to have joined this company in these five evils, and therefore to have fallen in the condemnatory category of conspirators. If those five evils did not exist, if they were not the inherent nature of this agreement that we have before us, then the other defendants, quite as much as Celotex, are free from any charge of conspiratorial conduct.

I would like now to step back and just analyze the situation with reference to those three agreements that I will call the 1933 and 1934 agreements, the 1936 agreement and the 1941 agreement.

Taking them in that order, the opening reference should
804 be to two sentences in the Circuit Court of Appeals decision, which say—and I use the language and I am not now indulging in poetical flights of fancy of my own—as Judge Woolley puts it, the idea of making an artificial board from wood itself, was at one time a dream. It was a dream of a number of minds, one of those things, I might say, that forward-looking people realized as a dream which would be of great benefit to the human race. He says:

"Mr. Mason found a way of bringing that dream down to earth. What he proposed was to depart abruptly from the arts and avoid chemically digested fiber and chemical action anywhere and resort to a wholly novel practice of tearing wood into shreds, that is, separating out its fiber and putting them back again physically."

That was already a main factor in the wood itself, and that is the reason he calls it synthetic wood, and he sees the realization of this dream was so obviously valuable to humanity that he received the medal at the Franklin Institute from the Association of the Paper and Pulp Industry. It was a sort of Nobel Prize in this particular limited field.

If there is any justification at all for the constitutional policy

in giving, as the Constitution provides, exclusive right to inventors, I say it is certainly applicable to this hardboard.

Then after some ten years we now find the anti-trust division coming in and saying that the Masonite Corporation, which is the embodiment in corporate form of Mr. Mason, is to be deprived of that reward. They will not deal with us on any basis unless we give up the right to our reward. We are to be relieved of our right to fix prices; we are to be relieved of the right of having exclusive right to that.

I noticed Mr. Cox in his opening statement said that he wasn't very familiar with the patent law, I am sure he really is.

895 That was said with a great deal of modesty, and speaking of the patent law, the only right he mentions of exclusive character was to manufacture and to use. The patent law is not so confined. It is a trinity to make, use, and vend. They are the express words associated in the patent law, with the words "exclusive right," and I need not remind anyone that the Supreme Court has held that each one of those rights can be separated by the patent holder one from the other and made the subject of a separate agreement. We can give a right to manufacture and we can give a right to use or we can give a right to vend—and I took down a note of his statement that if this matter had been handled by license, it would have been an altogether different picture, and he would have no criticism if it had been handled by license. Well, has this case come down to a mere play on phraseology? Is it because he seems to suppose we did not use the word "license" in these agency agreements, therefore we are guilty on the terminology of agency instead of license? In response I would say a license to them is nothing but an agency expressed in terms of patent law, but what he did overlook was that this agreement is in terms of license. We call it that because we have followed the phraseology suggested to us by the complaint, "del credere agreement." But when you come to look at the terminology, we find in the very opening paragraph, "The manufacturer hereby appoints said agent as a del credere factor and hereby authorizes said agent and licenses it under said Letters Patent to sell the said hardboard."

Mr. Cox told your Honor that the license phraseology was limited to an option—an option to take a license to manufacture. There is no option about the language which I have just quoted. It is an expression in the explicit language of the agreement itself.

(Recess until 2:15 p. m.)

896 AFTERNOON SESSION

Mr. TUTTLE. If the Court please, the purposes alleged in the complaint to have been at the origin of the October 10, 1933, agree-

ment having failed, because it was either erroneous in law or erroneous in fact, the question comes up as to what the purposes really are, and whether those purposes are in any sense illegal. I don't need to go over the picture, because it is so familiar now through the testimony of a number of witnesses, all harmonious, that in 1933 both parties to that agreement were in desperate financial circumstances.

The Masonite Corporation was dying of financial anemia. Its capital had been exhausted. Its directors were undertaking, or were forced to meet its payrolls by endorsing its notes. The capacity of its force was below the economic level at which it could be operated successfully. The employees were being rationed. A temporary method of keeping them employed, by putting them into a canning business was of course only a temporary makeshift. That patient at least was in the situation of one who has no hope unless he can be put into an oxygen tent.

The same might be said of Celotex at that time, although it was a much larger concern. It was in the hands of receivers. It needed new life from some source, if it was to come through with a successful plan of reorganization. And by a strange coincidence the receivers were the agents of the very court that had before it in full the whole situation concerning Masonite Corporation, by virtue of its study of the patent litigation.

Now, if, in consequence, Judge Nields's decision had stood, it would not be a strong guess to say that this litigation that we have here today would never have been heard of, because there would have been no Masonite Corporation.

897 At that time comes along the decision of the Circuit Court of Appeals, reaffirmed in its refusal to entertain a motion for a rehearing. I suppose business men were by that situation, that change in the situation, forced to consider the possible choices that they had before them. They certainly could not delay. Some decision had to be made at once. The three choices were these: one, they could press on against the Celotex Corporation to endeavor to recover from this estate in bankruptcy the profits and damages.

I suppose they would have added nothing to their capital; it would have added to their expense, and it would have been entirely problematical.

The other choice was that, of course, they might sit back, have no relations with anybody, and undertake to make direct sales on their own strength and by their own selling organization.

And the third choice was to exercise their express statutory right under the patent law to have the exclusive right to vend and to license accordingly.

The second choice, the one to rely upon their own selling

capacity was, of course, absolutely rejected. Where would have been the force for it; where would have been the capital to create the force; where would be the experience and the training and, above all, where would have been the immediacy? What the Masonite Company needed to survive at all was, of course, immediate mass production, and to get that immediate mass production they needed two other immediate things: One was entree into this very difficult business of building material sales, a business which is obviously affected so completely, with inertia and requires so many contacts in order to generate the dynamic power to overcome that inertia.

And, finally, with entree, simultaneously with it, they would need distribution. Without entree and distribution, they could have no such thing as mass production.

898 Now, I think that if they had taken the first course and the second course, it would truly have been said that the operation was successful but the patient died. That would have been the end of that litigation.

It seems to me that they took the only course which wisdom dictated, and which was well within their rights under the patent.

But are we to sit here and decide this case by casting dice, so to speak, as to whether or not they did exercise the wisest choice? It is enough, isn't it, that they exercised an honest judgment, that they made their decision in the exercise of a sincere appraisement of the situation and a deliberate conclusion that for the interests of their company they were honestly moved to the third choice?

Mr. Cox has asked of all the witnesses the question, "Why?" In an ultimate sense, I think that question was entirely irrelevant. The Sherman Law does not constitute the United States Government ex officio a member of every board of directors, and certainly it does not constitute the United States Government a trustee in place of directors, or give it a controlling or veto power over their decisions.

The question is, did they act honestly, was there room for choice, was there room for opinion, and did they arrive at an opinion which is definitely stated, and for which reasons which lie within the rationale of a board of directors can be given?

I will, however, digress a little bit from the logic of my argument and endeavor to state very briefly the answer to the question why beyond what I have already said.

In the first place, there was no other manner in which they could get this mass production immediately. You have heard the testimony, undisputed, that a few years before the Masonite Corporation had two salesmen. The territory which each was in

899 was very narrow and circumscribed! One had nearly the whole of the United States east of the Mississippi, and

the other had nearly the whole of the United States west of the Mississippi. That was territory which, of course, could adequately be disposed of by two men! And imagine the effort by the Masonite Corporation if it had taken the second choice to get mass production through the efforts of two men! By 1933 I think the two had multiplied to about two score. But even then, this is quite a country for 40 men to cover, and when your Honor comes to look at the map, which is Exhibit SS15 attached to the stipulation, you will see as of 1933, in the red dots, not the salesmen, but the dealers. Of course there would be more dealers than there would be salesmen, and yet these dots are few in number in comparison to the enormous—the red dots are few in number in comparison to the enormous distribution of the black dots, representing the dealers of those respective agents at that time.

So, having the right and the exclusive right to vend and to grant a license to vend, that is the choice, as I say, that they made. That gave them the three things that they needed. The Celotex Company or its Receivers at that time had a unique past and a unique present.

It was probably, I believe according to the testimony, the largest existing distributor of building materials, at that time at least, or one of the very largest in the United States. It had the entree. It had put in years of advertising. It had become a household word with architects, contractors, dealers and the public generally. It had the facilities. What it lacked at that moment was the right to sell hardboard as well as it own softboard. It lacked that diversity of line which was then being demanded by the public. It could not get hardboard, as it had in its past, by its own force, because the decision of the Circuit Court
900 of Appeals stood in the way. It therefore faced a situation where its own force of salesmen was deprived of hardboard. The hardboard which they had had in the past stood condemned by the court, and had become a liability rather than an asset.

They had to go before the public and admit that they no longer could fulfill the common ordinary requirements of the building trades for both kinds of board. It was a desperate situation for the receivers to find themselves in.

On the other hand we, not through our own force but through the force of Celotex's existing sales force and dealer system, had a chance to accomplish entree and distribution at a time and in time to meet our very grave emergency.

Now much is made by Mr. Cox of the thought that in exercising our right, our exclusive right to vend, we kept a voice in the vending. Why not? If we had the exclusive right to vend we certainly had a right to have a voice in the vending. I don't

think that has to be defended, for a moment. Does it make a difference if our voice in the vending necessarily expressed some interest in the price? This was no patent pool. We were not buying patents with which we had had no connection in the past, and trying to cover a whole industry or a great variety of products. Not at all. We were interested in but one patent. All this had to do with that single, very limited product, and we were not interested in the industry at all but in the vending of that particular product.

We had a statutory and constitutional right to have a voice in the price at which we would sell that product, whether we sold it by direct sale or whether we sold it through agents or licensees. Consequently there is nothing in the Sherman Law—and this is the heart of the case in my judgment; that can deprive us of that fundamental constitutional and statutory right.

901 How did we exercise the right? In the first place, as it appears in the evidence, we did not undertake to build up any discriminatory system. There isn't a particle of evidence here to indicate that we refused anybody who could responsibly afford equal or similar facilities. Everybody was treated alike as they came on with their purchases and requests during the ensuing year. Discrimination is always a badge of possible violation of the Sherman Law. We negatived discrimination. In addition to that, we undertook to provide opportunities for escape from these agreements. We allowed each of these agents to withdraw at their own option and choice, without any statement or reason, on six months' notice. As I said before, we did not undertake to hamper their scientific or practical researches in the slightest degree. We left them entirely free to withdraw from this agency, from temporary recognition of our patent, and to enter into battle with us either on the economic field or on the field of the patent law, and every one of these agents, with a very few exceptions, realizing their opportunities of freedom in that respect, have attempted to see if they could make synthetic wood.

Furthermore, we did not undertake to control any other product. Of the cases that my friend has cited in his trial brief, you will find they are all cases where somebody having obtained a patent or a pool of patents has attempted to reach out beyond the product covered by that patent, and to control other things at the same time. That was the Ethyl Gas case. There the patent was on some products which went into ethyl gas but which were not in themselves ethyl gas, and yet there was this arrangement standing throughout the entire United States, whereby with this limited patent, they went beyond it in their attempt to control another product. The only thing we were seeking to fix a price for was the entire product—one single product.

902 all of which was within our single patent or those affiliated patents which were associated with it.

So there again there were none of the usual indicia of a violation of the Sherman Law.

Let me point out in another respect that there was not. There was no limitation of production. On the contrary, as I have already stated, there was an enormous expansion of production in all directions. Again there was no rise in price. I wonder if your Honor would do me the favor of just looking a moment at SS1 in this final stipulation. There are the four prices of our principal products as we had them in 1933. October 10th, of course, would be nearer to the righthand side of the square or column representing 1933. Does your Honor observe that in three of the four products in the making of that agreement with the company there was a drop of price, and that the solitary exception was of "Quartrboard" where there was no rise in price at that time, but a level maintenance.

If you will run your eyes to the right all the way across the page for each one of those four products, you will see down to 19[illegible] there is either the same level or lower level for each one of those products, and then if your Honor will turn to what I regard as two very illuminating charts beginning with SS9—now, SS9 is purposely put on transparent paper so that you can see SS10 underneath it as you hold one over the other. SS9 indicates the monthly dollar carload prices. These are prices for Standard Presdwood.

You will see that from 1933 to 1939 the price, if anything has gone down, yet underneath you will see looking through the transparent paper what has happened to the material cost and the labor cost going into the manufacture of that Presd-

903 wood. Those two papers constitute our acquittal of any possible charge under the Sherman Law. I do not know of any prosecution under the Sherman Law which has succeeded or could succeed in the face of those two comparable facts.

And then if you will turn two pages, to SS–11, you will see another product. I was dealing first with standard "Presdwood," and now with "Tempered Presdwood," and you will see through the transparent paper the same comparison. There has been a slight rise, almost nominal, in those seven years in the price of our "Tempered Presdwood," and there has been a gigantic rise in costs.

Now how is it that we accomplished that? How do we stay alive against that? Can it be said that we stay alive through some conspiracy against the Sherman Law, or must it be said that

the factors are good management and the service of the public interest through mass production.

Now let me take another indicia. Mr. Cox was good enough to say that the evidence showed no moral turpitude, it showed none of the usual methods by which competition is sometimes suppressed, such as threats, coercion, duress, cutthroat competition in limited areas so as to throw out the weaker competitor. There is not the slightest evidence of unconscionable competitive methods, and none is charged in this complaint on any of those subjects. Furthermore there is no charge, and there is no evidence of harassment and overburdening by the bringing of specious litigation.

There are plenty of instances, of course, known to your Honor and to the world, where somebody holding a patent has endeavored to swamp his opponents who are less capable of standing the expense with burdensome and specious litigation. The only two pieces of litigation that we engaged in, except
904 the one which we have been obliged recently to start with the United States Gypsum, terminated in our favor—the Celotex and the Insulite.

The stipulation of facts in this case shows that as to the Insulite we engaged immeditely in interference proceedings. We were successful in the Patent Office in the interference proceeding. So says the stipulation. It appears then that a little later the Insulite Company, dissatisfied with the decision of the Patent Office, brought a proceeding in court to establish a priority.

I was thinking of Gypsum on the proceedings in the Patent Office.

They started a proceeding in court to establish the priority, and that proceeding was dismissed, and then we brought a suit against the receiver of the parent company in that case, and there attention must be given to a decision of the Court instructing the receiver on the full showing of all the facts.

Is it the position of Mr. Cox in this case that Judge Nields, with his knowledge of all the facts, and these receivers, who were not officers at all of the Celotex Company, and the Court who had the receivership in this Insulite matter before it and the receiver in that case who presumably was not an officer of the Insulite Company or the parent company, were all participants in this conspiracy?

If that is not their thesis, then aren't they driven back, in all fairness and logic, to the idea that this was sort of an ex parte conspiracy just by the Masonite?

Who were the parties, really, now that we have got the whole picture before us, of this conspiracy alleged to have taken place on October 10th? Well, Masonite. That is easy on the one side.

But who on the other? Are we to say it was the Federal Court? How is Mr. Cox to escape it? So in the case of the Insulite; how is that to escape?

On the subject of the Insulite patent, lest it be thought
905 that we were cooking up some claims, there is presented to your Honor in the form of the stipulation with the Insulite Company its process, and it is at page 306, and I am going to call your attention to the description, it is very brief, there given of the process which the Insulite Company utilized, and as I read it I will ask your Honor to compare it with the description of the process given by the Circuit Court of Appeals for our product.

First: "Wood was reduced to pulp by means of grindstones."

In other words, they didn't have even the excuse that Celotex had. The Celotex Company sugar was not wood, and therefore they were not within our patent at all. But this is wood. It was reduced to pulp by means of grindstones. You will remember what I read from the opinion of the Circuit Court of Appeals, that Mr. Mason had found a way of shredding the particles of wood. He did it by a steam process. And this was done by grindstones. The result was identical. "The resulting pulp was passed through a screen to remove coarsest parts." That is of course what we did.

Then "Alum-and-rosin size was added for waterproofing." We too added a waterproofing, part of the patent description.

"From the pulp a wet board was *formed*." *Well, that is our* wetlap. "And cut into insulation board blanks." Those are the sizes.

"These blanks were passed through a hot air drier."

"The blanks were placed on surface plates in a platen press." Well, we used the platen press. "Having twenty openings." We had about that. "Each of the press platens being provided with a wire mesh screen on its under side." I remember your Honor looking at our product and asking what were those impressions
906 on the underside, and the witness said it was the impression left by the wire screen which had to be used to prevent explosion of the moisture in the product while it was in the hot press.

"The press platens were heated by means of steam." So were ours.

"The press was closed and pressure applied by means of hydraulic rams, converting the insulation board blank into a hardboard." So did we exercise pressure under the circumstances.

Now, the only difference, the sole and single difference, between this description of the Insulite process and the description given in our process in the Circuit Court of Appeals decision is this: They say that in addition to shredding the wood by grind-

stones—and thereby, of course, preserving the lignins, because lignins can be destroyed only by cooking them out with chemicals, leaving thereby only the cellulose, grindstones would not do that because these things are almost microscopic,—in addition to preserving the lignins as a binder, it says here that they added also a binding material of the nature of an oil.

I suppose that litigation would have turned, if it had any chance of success at all, on the part of the Insulite, on the question of whether the binding material added by way of oil played a larger factor than the lignins did in bringing about the ultimate cohesive character of the board itself, and I imagine that inasmuch as that suit was brought by us in the very district that this Circuit Court of Appeals sat, the Federal Court that was instructing the Insulite Receiver felt that a description of that kind would stand small chance of success.

And so I have gone over this simply for the purpose of impressing your Honor with the thought that we were not bringing harassing and merely specious litigation.

As to the United States Gypsum, I shall have something to say in a moment.

907 Furthermore, in the Ethyl Gas case there was an indicia pointed out by the Court, another one of the indicia pointed out by the Court, which was a characteristic of conspiracy to restrain trade, to wit, the curtailment of the dealers in number and in the price at which the dealers could sell to the public.

There was no such feature in our situation. We multiplied the dealers, I think according to the stipulation, some 30 or 40 times. Instead of being 40 dealers there became something like 1,500 or more dealers. And instead of limiting the price at which the dealers sold to the public they of course could sell at any price they chose.

Then, again, finally, if there is a conspiracy as to price, you will always find somebody sitting down on opposite sides and agreeing as to what the price should be. That is entirely negatived in this case. Not only is it negatived by the oral testimony, but by every stipulation here, and I can't stop to dwell on it. It was negatived by the stipulation that the executives would testify that there were no conferences and no consultations by them. The price was set by the patent holder. And in addition to being set by it, the public was told. There was nothing mysterious about how the price was arrived at. It was arrived at on the theory that we could make a success out of this business against rising costs by getting mass production and selling at low profits, and thereby competing with that sea of low products which was made up of vast numbers of substitutes for our product so far as function

is concerned—substitutes for some function or another function, or for several functions.

As Mr. Alexander put it, our policy was to keep our price on the low-level basis so that we could be in the cheap market. It was there only that mass production could be found.

I suppose one of the greatest contributors to American civilization has been Henry Ford, and the reason why he has
908 served his public so well is that he has kept his price not on the Rolls-Royce level—he has had no ambition for Rolls-Royces—but on a level that the farmer, the small wage earner, and small merchant could meet. And it is there in the building industry that we have been at all these times. Consequently we are up against enormous competition.

Now one thing more on the subject of indicia of illegality, those things which indicate corrupt purposes, and that is that there has been no misuse of our patents. I have been in position to know, in connection with another suit brought by the Anti-Trust Department against a large industry where there was a huge patent pool, and many patents were taken out and never used, simply for the purpose of preventing anybody else patenting a like process or thing.

In that case, too, it was charged that many patents were taken out for that very purpose of fencing in a competitor's patents, so he could not develop his patent and he would run up against infringement suits. There is no such claim and no such proof here.

That brings me to the agreement. You wouldn't guess, looking at this agreement, that it was the same agreement that they referred to in their complaint, because they say it was an agreement between The Celotex Company and the Masonite Company. It is no such thing. There is no such agreement. This agreement is headed, "Hobart P. Young, duly appointed Receiver of The Celotex Company under a certain order of the District Court of the United States for the Northern District of Illinois, Eastern Division."

In other words, it was an agreement between the Court and the Masonite Corporation, and it says,

"The Manufacturer hereby appoints said Agent as a del credere factor and hereby authorizes said agent and licenses it
909 under said Letters Patent to sell the said hard board products manufactured by said Manufacturer."

And the reference here is to the patent by which we make this hardboard, as described by the Circuit Court of Appeals and the definition is to that effect,

"For the purpose hereof, hardboard products shall be deemed to be products covered by or made under the processes of said patents."

I pause there because the definition is so important. This complaint is drawn on the theory that in some way we were restraining the merchandising of any board, no matter how made or out of whatever materials made, so long as it was hard. They have utterly failed to prove anything of the kind. We have not restrained the manufacture or distribution of boards simply because they were hard. There are any number of them and we are in competition with all of them.

Then it goes on to say:

"The Manufacturer shall from time to time designate the minimum selling price and maximum terms and conditions of sale at which the Agent shall sell Manufacturer's products hereunder."

I cannot conceive how that can be by any stretch of the imagination any violation of any law whatever.

Then it goes on to say:

"The right to change the list prices and terms of sale is vested solely in the Manufacturer."

There has been considerable debate by Mr. Cox to the ef-
910 fect that unless we reserved to ourselves, the Masonite Corporation, the right to be dishonest, we must be deemed violators of the Sherman Law.

As your Honor well said, it is a violation of the ordinary canons of common honesty to appoint an agent and fix the price at which he shall sell and on the strength of which he shall make his investment, then turn around in the dark of the moon and undersell him. I submit such business is the business of the outlaw and buccaneer. Consequently I ask is recognition of common honesty a violation of law? If it is, then we are guilty, because this agreement expressly provides that it, the manufacturer, will not depart from its own published advertised price list according to which the agents make their sales, excepting after proper notice to agents as elsewhere herein provided.

On this issue of common honesty, Mr. Cox attempts to distinguish the General Electric case because he says that there is no provision in that case requiring common honesty on the part of the licensor or manufacturer. He is mistaken in that respect—utterly and completely mistaken. I have got here a record on the appeal to the Supreme Court of the United States, and I am reading from paragraph 16 of the agreement, and it says, in determining what would be the consequence of a breach—I am reading from page 24 of the Government's own brief, which deals there with a quotation from the fundamental agreement made by the General Electric Company in that case, and paragraph 16 thereof treats of what shall happen if either side violates the published price. This is the Westinghouse license, but the Westinghouse agreed that if would license on that same basis and the West-

inghouse was one of the biggest manufacturers in the business. That is the ground of distinction—not distinction but parallel I am going to make in this case—that they had big ones
911 in that case, too, and the Westinghouse Company was here as a licensee on the one hand and a licensor on the other:

"Similarly, the damages shall be determined by the Arbitrators in case of sales of lamps by the Licensor at prices lower or on terms and conditions more favorable to the purchaser than those established by the Licensor for sales by the Licensee."

Then it provides in that case that there may be damages and an injunction against the licensor.

And in the Government's brief it says:

"It obligates the licensor to sell lamps at the same price, and on the same terms and conditions as the licensee, and thus prevents the licensor itself from exercising a free judgment as to prices at which and terms and conditions according to which it shall sell its lamps."

And a little later, the Government of course says, even if it did not so provide it would be the necessary deduction in the name of common honesty.

That being so, I do not see why our agreement stands condemned unless, as I have felt instinctively all along, the Government is really fighting the General Electric case and hopes to succeed in that fight.

And then comes Paragraph 7:

"The manufacturer agrees to ship hardboards in accordance with the orders and specifications of the agent. Said agent agrees that on direct shipments to the agent said hardboard will be received and held on consignment."

912 No purchaser receives or holds anything on consignment. Agents and licensees do.

"And that the title thereto shall remain in the manufacturer until sold by the agent."

I assume that in a free country parties have a right to make such an agreement as that between principal and agent, that the title shall remain in the manufacturer, the principal. Now it is true that in the next succeeding paragraph there is a del credere provision. In other words, it says that one-half of the difference between the list price thereof and the agent's discount thereon shall be advanced by the agent within 20 days after the close of the calendar month in which the order is shipped by the manufacturer, and the balance thereof shall be paid within 20 days after the close of the calendar month in which such shipment is made of hardboard products sold by the agent to its customers.

Now the only difference between that clause and the clause in the General Electric Company case is that we were more liberal

to the agents. We allowed 20 days; the General Electric Company allowed 10 days. The same del credere provision otherwise appeared, and it is a justifiable provision because how could the principal, the manufacturer in this case, sit in judgment on the character and the credit which the agent was extending all over the United States. The agent must take the responsibility of his own decision as to credit, and the responsibility as to the persons whom he wishes to sell. That is a fair and just arrangement.

Then it says here, "that the agent agrees to report on or before the 20th day following the close of each calendar month to the manufacturer on forms furnished by the manufacturer, giving an inventory of all products consigned to the agent and
913 on hand and unsold at the end of said month in such detail as may reasonably be requested by the manufacturer."

That would be senseless if the transaction were a purchase and sale.

"The agent to have the right of cancelling this agreement by six months notice in writing"

and so forth.

"If it is so cancelled then the manufacturer may demand a return of all the goods on consignment and up to that date unsold."

And then, finally,

"The manufacturer shall not be required to accept orders or deliver hardboard products in excess of its manufacturing capacity, it being understood and agreed that the manufacturer is selling hardboard products on its own account as well as through the agent and other agents. The agent may reconsign products of the manufacturer's to sub-agents with the approval of the manufacturer, but on condition that the title to said products shall remain in the manufacturer and the sub-agent shall conform to all the sales terms and sales conditions of this agreement."

Mr. Cox points to certain provisions which he thinks are indicia of a sale rather than an agency. It says that "the agent agrees at its own expense to carry adequate insurance against usual hazards concerning all products consigned to it, and all policies shall, if assigned to the manufacturer, be payable by the agent and the manufacturer as their respective interests may appear."

914 We have a number of stipulations here from the respective agents, showing a great variety of methods of carrying that out. Some mention the name of Masonite Corporation as the beneficiary in the event of a fire. Some mention them both. Some, on the other hand, undertake to say, "as interest may appear," without the use of names. I think one or two

simply mention the agent. But in any event here is the provision which was intended to control, and it dealt of course only with consigned stocks.

Now I suppose in figuring and determining what should be the conditions that would be charged here by the agents, there were taken into consideration, as a business matter in averaging out that sliding scale according to the amount sold, the items of expense which the agent would have to carry.

It would not make a particle of difference, in dollars and cents, whether the manufacturer carried all the incidental expense, even the fire insurance on the warehouse of the agent, if the agent would receive a correspondingly less compensation. Why, therefore, should it become a sale rather than an agency because, inasmuch as the agent had control of the consigned stocks, they were in his keeping and custody, he had the handling of them and the responsibility as regards local authorities. He took on those things which were necessarily incidental in the consigned stock as between himself and the manufacturer and, in consequence, received perhaps a greater rate of compensation. Those things are merely a bookkeeping proposition. It depends on whether you put them on the righthand or the lefthand side of the ledger, but it all comes out at the same point in the wash.

Now this matter of the consigned stock to the agents can be very much over-magnified. Those consigned stocks, as this
915 agreement shows, were simply for the purpose of having a temporary amount in the warehouses of the agents for the purpose of enabling them to fill orders that pressed in immediacy—local orders—but the agent reserved the right here and had the right to order shipment from Laurel direct to the customer. And I think it is a fair assumption, inasmuch as in that case the manufacturer carried the freight, and in the case of consigned stocks the freight was paid by the agent to the point of consignment, it is a fair assumption that the agent invariably, whenever he had the chance and did not have to fill a local order out of local stock, saw to it that the shipment was made directly from Laurel.

I think now I have covered the main features of this agreement. It says, for example, the agent shall make all reports required by public authorities in respect of such sales of consigned stock for the company. He is the man on the ground, he is the man in the city, and that is a natural place to put that burden.

"When authorized by law imposing any sales or stamp tax, excise or charge, the same shall be reflected in the price and properly stated on the price list."

In other words, the agent could pass it on to the customer. Well, how does that in any way demonstrate that this thing, notwithstanding all its careful provisions, all its identity with the General Electric case, should nevertheless be deemed a sale.

Now a word as to this General Electric Company case. Here was something that, if we had it in this case, Mr. Cox would have made it a chief text of his sermon, and that was that until
916 these del credere agreements were made in the General Electric Company case the manufacturer, the General Electric Company, was selling direct to the whole world. The very people who became tied up with these agreements were its chief purchasers. So that on this question of a choice between direct sales on a huge scale to the people tied up with the agreements, and there they were, the big people in the business, rival manufacturers, the big wholesalers, the big dealers, and all the little people all over the United States, that agreement tied up everybody, put them all under two common agreements, according to their size, and those two common agreements replaced the opposite methods of doing business among the same people, and the Court says, and I will quote the headnote:

"The circumstance that the agents were, in their regular business, merchants, and under a prior arrangement had bought the lamps and sold them as their own, did not prevent this change in their relation to the company."

Now, what would be more significant of the real identity of an agreement than the prior practice which was replaced?

Now, I shall not go through the provisions of this General Electric Company case, because I expect to put them in parallel columns in the brief. They are too voluminous. But I will advance the thought that your Honor will be satisfied, on looking through these parallel columns that, taking them by and large, the General Electric case was a much more horrendous proposition than this simple one that we have here.

Bear in mind, if we are to speak of horizontals and perpendiculars in this case, the agreement in the General Electric Company case plumbed the very depths of the situation. Starting
917 with this giant concern, which has 69 percent of the business of tungsten lamps, it immediately tied up the rival manufacturer whose wealth constituted it a potential competitor, a potential rival inventor, the Westinghouse Electric Company.

Celotex, as a potential rival inventor, was a pigmy a foot high in comparison to the potentialities of the Westinghouse Electric Company as a competitor in any field you might wish to name, whether it was lamps or inventions or the manufacture of tungsten or any other kind of filaments.

It tied up, in addition, all the other manufacturers in the business. They were smaller than the Westinghouse, according to the statement of facts here, but they were all of them.

Now, we did not tie up all the people who were rival distributors or might become national distributors. We gave them the option to come in if they wished. But the United States Gypsum Company did not come in, and we sold to United States Gypsum.

Here they are saying we were avoiding, at all costs, direct sales. There is the United States Gypsum Company that we sold for years, having fights with them all the time. The stipulation is a little interesting in that respect, and probably this is a good place for me to comment on it.

It says here that in 1934 the United States Gypsum Company entered into the production of various fiber board products, some of which it designated as hard panel board, and that we engaged in a contest with it in the United States Patent Office, which contest was decided in our favor, and then they instituted a proceeding in the District Court which terminated in dismissal, and that these were over rival processes for manufacturing of hardboard. I think in describing the Insulite case I had this paragraph in mind, and I should have said it was the United States Gypsum case. And then the statement proceeds by saying:

918 "Since that time the United States Gypsum Company notified Masonite that it had changed its process of manufacture."

In other words, since being beaten, your Honor, in the Patent Office, and instituting an unsuccessful suit which it has to withdraw, it changed its process. I think it is a fair assumption that they were trying to make synthetic wood at that time. They changed its process of manufacture, and that such process did not, they claimed, infringe Masonite's patents, but they refused to divulge—this was in 1939,—its changed methods of manufacture.

We made every effort, says the stipulation of fact, to discover what that new change in the secret process was, and when we became convinced that it was nothing at all but an imitation of our own patent, we instituted suit against them.

Now, in consequence, it seems to me, your Honor, that so far as this agreement with The Celotex Company, which is said to be the origin of the conspiracy, there isn't a thing about it which in any way goes anywhere near the distance of the General Electric case, which instituted a series of agreements not only with the chief manufacturers but with all the jobbers and with all the dealers in the United States. They were all put under license. They were all restricted as to price.

What a difference! There were no such restrictions in this case at all.

Well, I cannot expand further on that because I intend, as I say, to produce an analysis of that in the brief.

Now the 1936 agreement. I think everybody is agreed here that that is merely the 1933 and 1934 agreement with a certain amount of clarification and additional verbiage. It looks to me, as I read the papers, as if there had been a lot of controversy
919 and the lawyers got together and did a usual lawyers' job, which is to take in a large part of the dictionary for the purpose of settling all kinds of conceivable disputes which may arise. I have been in that sort of thing myself frequently and take pride in it. I cannot conceive of a possible difference of opinion concerning the 1933 agreement which could have arisen which does not find an answer and solution for the controversy or potential dispute in the 1936 agreement. If the 1933 agreement is lawful or, put it conversely, if it is not a violation of the Sherman Law, then there is nothing in the 1936 agreement which is and certainly the complaint does not venture to allege that the 1936 agreement was the origin of this conspiracy.

That brings me to the 1941 agreement. And Mr. Cox says, with a great deal of relish, that at that point we got together in 1941 and confessed our iniquity. Well, I think it depends a great deal on how you look at it.

Here are a lot of us who he says were honorable gentlemen, not in a Pickwickian sense either. He says our integrity is not impugned in any way and I suppose he will agree that our patriotism as well as our sense of civic duty are not in any way impugned.

The United States Government comes along in this strange suit for which no parallel is cited or can be cited, makes criticism of various paragraphs and clauses in our 1933 agreement and claims they are violations of law.

The last thing these people want to do is to be violators of law in the estimation of their government. I think an attitude of that kind should be welcomed by a government having the slightest instinct of paternal relationship to its citizens, and it should not be misconstrued and characterized as indicia of criminality.

Where should we go? Should we take refuge by running to our lawyers and asking them what the Sherman Law means?
920 Is there any Bar Association that could be assembled in the United States that could tell a bunch of business men what the Sherman Law means, as it will be judicially promulgated tomorrow?

Our Supreme Court—and I say this with the greatest respect—has been continually and expressly overruling prior decisions under the Sherman Law. It has overruled them in the field of labor; it has overruled them in the Hutcheson case—I am very

grateful to them for that—it has also repeatedly overruled them in the field of industry. It is the most fluid and amoeba-like statute on our books. It expands and it contracts. It does seem to me that business men who in all honesty they find themselves under the critical eye of the Government should have the right to come forward and say, Well, now, we have got to do business. We have got to keep alive. We don't intend to give up our fundamental rights—rights granted us by the law and by the Constitution of the United States, and we want to avoid criticism by you, and we want your help in setting up our business in a way which would be lawful.

And what is the answer that Mr. Cox makes to us today? He says they will be satisfied with nothing else but that we conduct our business only on the direct sales basis. In other words, we will be the one concern in the United States that can't exercise its rights under the Patent Law. Every other concern having a patent will have the right to vend by license or agency, but we won't. We must go back to our 40 salesmen. We must return solely to the strength of our own capital. We cannot have salesmen simply because those salesmen which we have had are experienced, able salesmen covering a broad field. We will have all the poor salesmen we want. We can have the untrained, the inexperienced salesmen, those not connected with any large contacts, but we mustn't have those that are experienced
921 and trained, and who have large contacts. And I say, and I say it advisedly, that that is a poor attitude. It is a destructive attitude, an obstructive attitude to take towards honorable people, citizens of the United States who have sought to compose their differences with the United States Government. And I say there is no law for it. It is arbitrary. It is despotic.

This agreement of 1941 was an effort by the laymen and by their counsel to find the possibility of expression in a paper which would be free from any of these criticisms which are now made. And we submitted these efforts, so it is admitted, in due course. We didn't submit it as much as to say, "This is what we are going to do at all costs." In their reply they admit that we took no such attitude. We didn't ask the Government to sign on the dotted line. We didn't say, "Look what we are doing; we just want to show you, but we have nothing to say about it." We asked them to give us their viewpoint, to give us the benefit of their suggestions so that we could go on with a business at a time when this very Government is asking us to pay stupendous sums in taxes, and to contribute to the best of our patriotism to the national defense.

We asked reciprocity, and we were told that it was the policy of the Department not to give reciprocity. That is in their own

reply. They said, Of course we could do anything we thought lawful. We could do aything provided we were within the law. But whether we were within the law in their judgment would be told us after we had done it.

Well, I remember an ancient king by the name of Croesus who, being attacked by a superior force, went around to the Delphic Oracle and asked what he should do and he received
922 answer that if he didn't go to war he would be destroyed, and if he went to war he would destroy a great kingdom. Well, he was just as wise when he came away as we were, and the fell into the same trouble that we did. We were darned if we did and darned if we didn't. If we stood our ground and did nothing they would say we were a recalcitrant and obstinate bunch and ought to be whipped. If we undertook to get their view we were half confessed criminals and we were making a case on which the Government could at least ask for a consent decree against us pro confesso.

Now that is the 1941 agreement—and I just wonder—and I know it is rather a novel thing, but these are novel days. I think it is the kind of novelty which should be commended and should become contagious, and I should think the Government should help it along. That would end the country's being flooded with these anti-trust prosecutions, these knock-down-drag-out fights against American industries, unless consent decrees, more or less according to the view of the Government are signed up on the dotted line.

I am wondering, I may say, what will be the attitude of the Court towards a novel thing like this. Some of my associates would take the view that this litigation, in consequence—in view of the reply which the Government has put in, the challenge which it makes to liberty in the 1941 agreement, brings this whole case down to that agreement. I don't know whether it does or it doesn't, but it at least does this. Without demonstration, beyond a shadow of a doubt, our good faith, our desire to obey the law, our taking of every recourse to avoid the situation in which we stand here before your Honor, because this does not produce any constructive results. This sort of thing is nothing but destruction. At a time when we need construction, when business men have got for the purpose of national defense to give themselves to building their industries strongly, we are among
923 the great multitude who are being knocked down with these multitudinous anti-trust prosecutions. I say it is destructive where constructive processes could be more wisely pursued, and I am not at all sure that the Court has to follow the attitude of the Anti-Trust Division when it finds people who desire to give constructive results.

Mr. Cox says, oh, yes; he will give constructive results. All we have to do is give up any mention of price in this situation and he is satisfied.

What right has he got to make any such demand of us, when that right is given to us by the Patent Law? I have a right to rent the house in which I live if I choose to do it. What would we think if, because of some traffic violation the Government said to me, "You rent the house, but don't charge any rent for it. You have lost your right to name the rent." That would be despotic. It would be arbitrary. Solutions for these things are not to be found in compelling people under a club to give up their lawful rights; the solution is to aid them in putting their house on a proper foundation if the Government thinks it already is not there.

We have made our gesture, and it was repulsed, but we are making it here again in court through this agreement; and we believe that the approval of this agreement by the Court, both sides asking for an adjudication as to whether it is to be approved or disapproved, furnishes the only necessary termination to this suit. All else is history and has ceased to be of any constructive importance in this situation.

I am sure we have satisfied your Honor that we have cancelled the agreements altogether, that this is the sole agreement in the field, that there is nothing under the table, there is no
924 knocking on wood, there is no pressing of each other's toes in hidden corners. This is the agreement. Both sides ask for an adjudication. What, in all common sense and practical consideration, is there left of this case except to determine that. Do they want to whip us for something in the past that is no longer being done?

So, your Honor, it is in that spirit that we are leaving this case in your hands. I will say, lest some of my expressions be deemed personal, they are not intended as personal—I am personifying the other side not in the person of counsel, of course, but in the person of the interest which they represent. the Government on one side and these corporations on the other. I will say in closing that Mr. Cox has been, so far as the handling of this case itself is concerned, extremely fair and considerate. So far as the handling of the case is concerned he has more than cooperated in the bringing about of stipulations of fact and in the shortening of this trial. He has shown us every courtesy, and I could not leave the case without mentioning that on this record with the expression of my gratitude, and I hope he feels that we have reciprocated. But behind it all, behind the velvet has been the mailed fist, somebody's mailed fist. It does seem to me that in this business of ours—less than 1 per cent of all the entire busi-

ness of dealing in building materials, less than 1 per cent in dollar value—that this was going after butterflies with a 16-inch Big Bertha.

Mr. DALLSTREAM. If the Court please, I am not going to make the sort of argument that I had intended to make, and I will take only perhaps four or five minutes to express my views on two questions that are involved in this case.

Mr. Tuttle started out today with a reference to the marriage of these two companies, and I may say to your Honor that I feel for my client today a good deal like the outraged wife who
925 looks at the other woman and says, "You are trying to break up my home after I have given 12 years of my life."

We think we have gone out in this situation and spent a good many years in bringing distribution, public acceptance, for this product of Masonite's. We in good faith, as the record shows, after four patent counsel of standing had advised the Celotex Company that it could properly manufacture a hardboard, started in the manufacture and achieved a somewhat enviable place as a competitor of the Masonite Corporation. We were enjoined from carrying on that competition, and that competition, the only competition of any consequence which Masonite had ever had, was determined to be unlawful competition.

Now I take it that the Anti-Trust laws in speaking of competition are of course talking about lawful competition. For fear that your Honor might not be advised of the extent to which these stipulations go I wish to call your attention to the fact that in addition to the testimony which Mr. Dahlberg gave as to the research work that was carried on, Mr. Munroe is shown by the stipulation to be ready to testify in detail as to the many many processes which were the subject of experimentation by the Celotex Company, and later by the Celotex Corporation; how during the period of the receivership, even after this agreement was entered into, they worked steadily and effectively in an effort to produce either a product outside the scope of the Masonite patent, or a product which was somewhat similar, even though it was not practically an identical product.

Each of these courses of experimentation and development work were found to fall into one of two classifications. Either in the long run they were found to infringe the Masonite patent and therefore had to be abandoned, or if the patent counsel
926 gave encouragement they were without the scope of that patent; they were found to contain some binder process which involved additional material costs, length of time in the driers, and things of that sort which added so materially to the cost that the product could not be sold in competition.

Those stipulations also show that that experimentation work

has not been abandoned. The company has been steadily manufacturing in England, where it is free of Masonite patents. The stipulations show that it is the avowed intention of Celotex Corporation to re-engage in the hardboard business, either in 1945, when the patent expires, or earlier if they can find a way.

What is this competition which is being restrained, which Mr. Cox is speaking of? It is admitted that it is not actual competition, because no actual legal competition has ever existed. It therefore must be that ephemeral thing, a competition that would result if, as and when someone can find a way to manufacture a product outside the scope of these patents.

All of the evidence in this record points to the fact that each and every one of these agents have steadily and continuously carried on research work in experimentation, even to the point of producing full sized boards in an effort to find a product with which they could enter this field in competition and sell their own product, and that they have not up to this time been able so to do. I think Mr. Cox's view of this so-called potential competition, this ephemeral, elusive thing which none of us can visualize, is the type of competition that would result if the Masonite Corporation said to the world, "We will give up our patent rights,
we will give up our right to control the manufacture, use,
927 and sale of our product, and we will let anyone that wants
to just buy from us and go out and sell in an unrestrained
manner to whomsover they choose."

I think this record shows very clearly, first, the efforts that were made to buy Masonite products by Celotex. The answer which Mr. Alexander gave, in addition to that Mr. Alexander stated at some length the policy of the Masonite Corporation in regard to the distribution of its product, and I think that shows quite clearly that was a policy that was based upon sound reasoning and after much thought on the part of the officials of their company.

The only kind of competition which Mr. Cox apparently visualizes is that elusive, ephemeral, nonexistent thing, the kind of competition which would be produced if, as and when Masonite said, "We fought for those patent rights and we are now going to give them up." I think we will all agree that this is not the kind of competition that needs to be restrained, because there isn't any likelihood of that kind of competition existing, no matter what happens.

The second point I want to cover very briefly is this question which in Mr. Cox's trial brief appears almost in every few paragraphs, and which he has referred to this morning, and that is this agreement on the part of Masonite not to undersell its agents. As

I understand the situation, the first two agreements are positive covenants, the last one is silent, but everyone agrees that Masonite is not going to undersell its agents. And why is everybody so ready to agree on that? It seems to me a good deal like the man who owned the apple orchard. He wanted to sell his crop of apples. He brings a lot of boys in and tells them to sell for him for a dollar a bushel, and says, "I will give you 15 cents as your commission, for selling them at that price." The boys go out, get their little red wagons and start down the street. In the meanwhile, the orchard owner gets his big wagon, gets up
928 with the megaphone and shouts, "The same apples that the boys are selling for a dollar I am selling for 75 cents a bushel." Well, only the first block needs to be traversed before the boys will dump their apples on the first street corner, and there will be no agents from that source.

set up a valid, bona fide arrangement. I assume it intended to set up a valid, bona fide arrangement. I assume it intended to set up an agency, if you please, which would work and which would accomplish the purpose for which it was set up. I don't think we needed any agreements in any of these agency agreements about whether Masonite was going to undersell its agents. It is not claimed that it ever undersold its agents, or did so by cutting prices secretly. There may be a perfectly logical way to lower prices, but if Masonite plans to undersell its agents in any other way, there just won't be any agents. I just say there won't be any agents, and there cannot be an agent that cannot meet that price and would not met the price of Masonite; at least I should take that position.

Mr. Dahlberg has stated, and the stipulation that Celotex offered this morning wasn't entered into in the 1933 agreement and 1936 or 1941 agreement with any other intention, or any other purpose except to secure to the Celotex Corporation a supply of hardboard which it might supply to its customers. Mr. Dahlberg stated he did not desire to have Masonite fixing the price at which he sold it. I think it is perfectly clear there wasn't any conspiracy or any desire on the part of these agents to fix a price. As a lawyer I have advised my client, and as a lawyer I cannot stand before this Court and intimate that we believe that Masonite has no right to fix the price on its own product. I believe that the cases decided by the Supreme Court give to Masonite that right.
Of course my client is human enough not to care if it could
929 get rid of these restrictions at the price at which it would sell, but for us to attempt to accept the suggestion made by Mr. Cox this morning is of course impossible. In the first place, it is not our right to determine it. It is Masonite's right to determine what it will do. If I were convinced, as I certainly am not,

that Masonite had exceeded its powers and rights in forcing this agreement upon us, I should of course insist that we still had a right to retain our agency arrangements, because we have paid for it through years of service and years of effort in exploiting the product of the Masonite Corporation.

I feel that the Government has failed in this case to justify any of the relief which it seeks, and that this complaint of the Government should be dismissed.

Mr. CHANDLER. Your Honor, opening on behalf of the Johns-Manville Sales Corporation, we outlined what we expected to prove. I can only state that every statement in that brief opening has now been abundantly demonstrated. The Johns-Manville Corporation wanted to get hardboard. It wanted to get it in order to add to its line, for the reasons and under the circumstances outlined in the testimony of Mr. Ames, and it applied to Masonite for a contract of some kind under which it could get hardboard to make it available to dealers and others with whom it was dealing, and it got such a contract.

The testimony of Mr. Ames and the stipulation which we put in yesterday and the whole record, make it perfectly plain that Johns-Manville never engaged in any conspiracy with anybody to fix prices or do anything of that sort. True, we took the contract under which Masonite appointed us del credere agents with the right in Masonite to fix the prices at which we sold. After careful consideration at the time, we thought that was legal and we think it is legal still. We feel it would be a very unwise and unfortunate precedent to establish that a principal cannot
930 dictate the price at which his agents sell, or that the owner of a patent doesn't have the right which Masonite claims here. In that connection I might refer to a rather interesting little statement in the Government's brief, carrying out some of the things that Mr. Dallstream just said. In the copy of the brief which I have, which they filed at the beginning of the trial, they say the agency agreement was entirely illegal because Masonite agreed expressly in 1933 and 1936, and perhaps by implication in 1941, that it would sell at the same prices at which its agents would sell. They say that in and of itself makes the agreement illegal. Yet in a paragraph in their brief, immediately preceding that, they say: "It is apparent from the language of the 1941 contract that the understanding still exists. Indeed the very nature of the arrangement requires that Masonite adhere to the prices fixed for the other defendants. If Masonite failed to adhere to these prices, the business position of the other defendants would be impossible."

Putting those two statements together, I cannot read them as anything else but this, that Masonite should have the right to

appoint agents, but the only circumstances and the only condition under which it may lawfully exercise that right must be such as to render the business or the position of the agents impossible. Those are the exact terms in the Government's brief.

It seems to me an illustration of a singular degree of futility to appoint an agent if that appointment makes the agency futile and useless. That is not perhaps the only thing of that type which is apparent in this case, because as I sat here for a week I said to myself, What is this case all about? And I came to the conclusion that if you want to find out what the case is about, you must turn to the prayer for relief of the complaint. In that complaint, Section 3 of the prayers, I find the following:

"That each of the agreements between Masonite (and
931 each of the defendants) be adjudged to represent an illegal combination or conspiracy to restrain and monopolize trade and commerce, and that the observance of each of such agreements in any respect and the execution of similar agreements be perpetually enjoined."

I wondered if when we executed the 1941 agreement they took another position, so I looked at the supplemental bill of complaint and that says that plaintiff prays to be granted all the relief prayed for in the original bill of complaint and: "that in addition to the relief prayed for in the bill of complaint the Court adjudge that the agreement between Masonite Corporation and the other defendants herein dated as of March 20, 1941, is an illegal combination and conspiracy to restrain and to monopolize trade and commerce in hardboard, and perpetually enjoin the defendants from observing or carrying out the said agreement in any respect and from executing any similar agreement."

And that raised in my mind the question of just what is going to happen to the agents if the Government wins this case. In the name of breaking up monopoly, they want to strike down all these agreements under which each of these agents now have the right to get supplies of hardboard as agents, to compete for customers and to spread it over the country, and they want to put all of that back in the hands of Masonite.

That hardly seems to be a very constructive approach to this situation. I don't think it is necessary for me to add anything further, your Honor. We have set forth the position of Johns-Manville, that from the beginning we thought these agreements were lawful when made; we thought they were not only lawful but sound business sense; and we still think so, and we find nothing that the Government has shown to indicate the contrary.

932 Mr. LAMB. May I merely point out on behalf of the defendant Armstrong Cork Company, that to negative the joining of any conspiracy alleged to have been made in 1933, the

record will show that as early as 1931 Armstrong, perhaps the first, sought out Masonite for an arrangement to obtain the right to manufacture and to sell Masonite hardboard. In the stipulation with the Government, on printed page 367, there are two sentences I would like to call your Honor's attention:

"So far as the Armstrong Company, or its subsidiary, Armstrong-Newport Company, was concerned, the making of the 1933 agreement was entirely independent of, and had no relation to, the making of other similar agreements between Masonite Corporation and Celotex or between Masonite Corporation and any other persons, firms or corporations. As stated, as early as 1931, Armstrong had determined that it wanted to be in a position to sell the Masonite hardboard, and being unable to obtain a manufacturing license at that time, it accomplished as best it could the same purpose and object in making the 1933 agency agreement."

The facts will show that the purpose and intent and objective of this defendant at all times during the 10-year period 1931 to 1941 has been that as stated in the stipulation.

I also want to point out to your Honor that the Armstrong Cork Company is a Pennsylvania corporation with its principal office and place of business in Lancaster, Pennsylvania, in the Third Circuit. I think I need say no more. That was the circuit where the adjudication of the patents had occurred, and certainly had we been interested in becoming involved in a patent litiga-
933 tion, the Third Circuit would have been the place where that would have taken place.

I want to point our further that on behalf of the Armstrong Company the record shows that beginning in 1938, it purchased outright from the Masonite Corporation quantities of Masonite hardboard for its own fabricating purposes.

Finally, I merely would like to add to what Mr. Tuttle has said, that if your Honor will go over the 1941 agreement and, having heard the nine points that Mr. Cox pointed out wherein there is a distinction with the General Electric Company case, and certain clauses and isolated parts of the 1933 and 1936 agency agreements, you will find that as to each and every one of those criticisms they have been overcome in the making of the 1941 agreement.

And, finally, in the Government's own brief, your Honor, they state this at page 24 of the printed copy of their brief:

"It is submitted that on its facts this case"—

meaning our case, I assume,

"falls within the rule applied in Standard Sanitary Manufacturing Company v. The United States, 226 U. S. 20, rather than within the decision of the General Electric case."

I think your Honor only has to read the famous bathtub case.

The COURT. I am not going to read it.

Mr. LAMB. I don't think it is necessary to read it.

The COURT. I have read it in the past and I am not going to read it again.

Mr. LAMB. The facts in that case which your Honor
934 may recall vividly show that a process patent was used abusively, which is not the case here.

The COURT. I know, but there is no question of contributory infringement involved in this case that I know of.

Mr. PIEL. If your Honor please, I would like to say just a few words on behalf of The Flintkote Company in order to call your Honor's attention to one fact relating to this particular defendant which has not been touched upon by anyone else, and that is that the date of our agreement with the Masonite Company was in 1937, so that while we thoroughly agree with everything that Mr. Tuttle has said, and subscribe to it, if his views advanced are correct, as we believe them to be, of course there was no conspiracy for us to join. But quite apart from that——

The COURT. If there was a conspiracy in 1937, it was quite possible that you would come in.

Mr. PIEL. That is correct, sir; and that is why I just wanted to say this further word to show how much they were strangers both to the original marriage of a monogamous variety, and the later Mormon affair, that it wasn't until this litigation started that anyone representing The Flintkote Company, as was stipulated and as the testimony shows, saw a copy of any other agreement that the Masonite Company had with any other defendant or knew what the terms and provisions of any other agreement were. We knew in 1937 who the people were who were distributing Masonite hardboard, but——

The COURT. You must have seen a copy of the others, because each one was equal to the others.

Mr. PIEL. The record shows, your Honor, that we received——

The COURT. I understood that they were all printed off the same press.

Mr. PIEL. That is not true of the agreement which we
935 signed. Although I believe we now have seen all these agreements, and while the one which we signed was used later with Dant & Russell, which was the last company, what we received was a draft prepared for us, as the record will show.

The COURT. Separate phraseology, was it?

Mr. PIEL. Sir?

The COURT. Separate phraseology? A difference of semicolons but not of words?

Mr. PIEL. There was a little more than punctuation; there were

several different provisions, and we did not even know what they were until this litigation began.

Now, under those circumstances——

The COURT. That gives me an out, I guess.

Mr. PIEL. In those circumstances, I want to address myself to the one question that really interests my client in this case, although there are a great many interesting questions, and that question is, after this litigation is over, are we going to be able to sell Masonite hardboard with our insulation board or aren't we? And the answer to that question, of course——

The COURT. Well, that may be a question that interests you. I don't know whether it has any interest for me at all.

Mr. PIEL. Well, the answer to that question may depend on whether or not we may continue to have our agreement of March 20, 1941, assuming that it is a valid agency agreement.

I want to address myself to the suggestion of Mr. Cox that our agreement, and I suppose he means our new agreement as well as any other new agreement, should be set aside even though it is decided that it is a valid agency agreement.

I want to suggest, and I am saying this only on behalf of The Flintkote Company, that there are only two reasons
936 why, if the new agreement is a valid agency agreement, it might be set aside. One would be that there were any antecedent record of bad faith on our part; and the stipulated evidence as to this company will satisfy your Honor that there was not. The other might be if this agreement, quite apart from the decency of our motives, had the actual effect of in any way restraining our effectiveness in competition, if it had the effect of tending to discourage us from doing anything that might tend to compete with hardboard, which, of course, enters a speculative field. On that score I would just like to call your Honor's attention to the stipulated evidence that:

"Upon the signing of the Masonite agency agreement of March 16, 1937, our efforts to find a substitute for Masonite neither ceased nor diminished. On the contrary, our efforts were accelerated and intensified, as the experience with selling Masonite hardboard has increased my interest in getting The Flintkote Company into the production of a similar material."

This is the stipulated testimony of the president of the company.

And the following three pages in the printed record, page 465, et seq., show in detail exactly what has been done in the way of investigation and research and what conclusion has been arrived at with respect to one possibility that has been taken up after another to find a way of getting into the manufacture of a hardboardlike substance. Until we can find that, we believe that our effectiveness as competitors in insulation board and the

insulation board field requires that we have an opportunity to sell the only now available hardboard, Masonite hardboard, with our product.

937 *Colloquy*

The COURT. Does anyone else wish to be heard?

Mr. COX. I do not wish to make a reply, your Honor, but there are two statements I would like to make. This morning I was not as clear at one point of my argument, and perhaps many, as I should like to have been, but one point particularly I think I had better make a statement about because Mr. Tuttle called my attention in his argument.

I said that if these were license agreements here the situation would be quite different. I was thinking at that time of the license agreements in the General Electric case to the Westinghouse Company, which was a license to make, use, and vend. I do not want to have that statement construed as an admission on our part that in the case of a mere license to vend as distinguished from a license to make, use, and vend, the licensor has any legal right to fix the price. I am not arguing that point. I just want to have it clear what our position is.

The other statement I wish to make is that yesterday I asked Mr. Sewell if he would tell me whether all of the court orders relating to the Insulite contracts were in the record, and he has informed me that the stipulation contains the court orders as to the 1935 agreement and that there were no court orders as to the 1936 agreement. Is that correct?

Mr. SEWELL. Yes.

Mr. COX. I think with that I have finished.

The COURT. Well, it is my understanding that you are going to try to write very brief briefs and have them in within a reasonable period of time.

Mr. COX. That is my understanding, sir.

The COURT. How long do you think it will be before you will be able to submit those? Will it be possible, in so
938 far as the defendants are concerned, to have one and only one brief in which say all participate?

Mr. TUTTLE. That is agreeable to me; yes, sir.

The COURT. I should think not to exceed 20 pages all told.

Mr. TUTTLE. Yes, sir.

The COURT. Really, after this argument, so far as I can see, the field has been pretty well narrowed, and I should think that the whole discussion comes down to whether this agreement was a real agency agreement or not. If it was, I should think I was pretty well circumscribed by the General Electric case, as I have read the case.

Then there is this other question about the 1941 agreement which, in so far as the Government is concerned today, seems to offer merely the question of whether, conceding that there is an agency agreement, a proper agency agreement, the Masonite Company has a right to fix prices, and I really can't see that there is a great deal of difficulty on that question for, after all, if there is a valid patent, and I think for the purpose of this case I am bound to say that there is a valid patent which has been sustained as far as it is possible for the Masonite Company to go, that then the Masonite Company is the sole owner of the patent and has the right to fix the price at which it or its own agent would sell the product.

Mr. TUTTLE. I think it would be agreeable to the defense to submit one brief within the limits that you suggest.

The COURT. The only limit that I was suggesting was merely limits of pages, and I do not mean by this little discussion in any way to circumscribe or to narrow the field of argument as to anything that anybody may wish to say, for I must confess that although I think I have got a pretty good idea of the questions involved in this case, I have not undertaken, and I pur-
939 posely have not examined the record or examined any of the exhibits that have been introduced in evidence during the trial.

Mr. TUTTLE. May I ask when would Mr. Cox like to submit his brief? My thought would be that if we exchanged——

Mr. COX. That is agreeable to me. I think we would want ten days, if that is not too long.

Mr. TUTTLE. Subject to your Honor's thought.

The COURT. That is entirely satisfactory. But perhaps again you may be able to limit the applicable law to the Supreme Court of the United States on this subject, so that the briefs would not attempt to go beyond the cases that are discussed.

Mr. COX. Ours will be very short.

Mr. TUTTLE. Well, ten days, then, and we will exchange at that time and submit at the same time.

The COURT. I should think that you have got the General Electrict case, the Interstate case, that was the moving picture case.

Mr. TUTTLE. Yes, sir.

The COURT. And the Ethyl case; and that is about all. Are there any others?

Mr. TUTTLE. Well, not in the Supreme Court, as I have seen the discussion here. As I mentioned in my opening, there is one case in the District Court. It is another General Electric Company case, sir. It involves an alloy, which I think is very much in order, because the facts are so analogous and close to the facts here. That is the 33 Fed. Supp. 969. I think I attach special

importance to that case for my own personal reasons because of the name of the judge who decided it.

The COURT. I don't know what case you refer to. What is the name of it?

940 Mr. TUTTLE. General Electric Company v. Willis Carbide Tool Company.

The COURT. Who was the judge?

Mr. TUTTLE. Judge Tuttle.

The COURT. Thank you.

Mr. GOSSETT. If your Honor please, another case as to the right of Masonite to limit itself, that is to limit the industrial field to itself, is the General Talking Pictures case. I think it is 304 U. S.

The COURT. General Talking Pictures?

Mr. GOSSETT. Yes. The first opinion was written by Judge Butler, and then it was reheard and Judge Brandeis wrote the second opinion.

The COURT. What was that case? I don't recognize it.

Mr. GOSSETT. It is a case in which there was a license under a patent I think owned by a pool controlled by General Electric Company.

The COURT. That is the one that was referred to here this morning. Yes, I think I have read that case.

Mr. GOSSETT. Not the General Electric case in 172.

The COURT. No, I know.

Mr. GOSSETT. This case is in 304, 175.

The COURT. All right.

Mr. PIEL. If your Honor please, with respect to a joint brief by the defendants, I don't think it would be fair for me to ask the other defendants to give any part of their precious few pages to pointing out the distinction which I say exists in fact as to the position of our client, and I would like, if I may, to submit two or three pages on that point.

The COURT. All right. You can put that in as an addenda.

Mr. TUTTLE. Your Honor, about findings of fact and conclusions; have you any practice that you wish to observe?

The COURT. I haven't any practice.

941 Mr. TUTTLE. I am told that——

The COURT. There is no practice.

Mr. TUTTLE. A rule that requires their submission.

The COURT. I don't know of any such rule. The rule now in this court, as I understand it, is that there need not be any findings of fact or conclusions of law until such a time as somebody wants to appeal to a higher court, and then the District Court, in its wisdom, if it has any, may designate a reasonable time within which those findings may be submitted, but I certainly don't want

at this time to suggest that any findings, proposed or otherwise, be submitted. But I would like to suggest that all the exhibits be taken and placed perhaps in a pool somewhere where they can be retained at least until the case is submitted.

Mr. TUTTLE. Shall we leave them with your secretary?

The COURT. I don't know that I want that.

Mr. TUTTLE. Suppose we leave them with the Clerk of the Court.

The COURT. The price lists I am quite certain I won't want at any time. I don't mean to be facetious about that, either. But these I have looked over hastily, and I think that probably all exhibits such as orders of the court and the rest of them, I doubt whether it is necessary to have those. I should say that those could all be taken and deposited somewhere where they may be needed. As to the rest of these, they are most of them pleadings, and I doubt whether I want any of them at this time. I think it would be better if you could take them and see which of them need to be filed and then perhaps you can agree among yourselves as to the exhibits that should be submitted when you submit your brief.

Mr. TUTTLE. Well, we can leave them all right here with the Anti-Trust Division, which is right in the same building.

942 The COURT. All right.

Mr. COX. That is all right.

Mr. TUTTLE. Now one final thing, your Honor. I mentioned yesterday the subject of a few typographical errors, and I can put them in a stipulation and I will give it to the stenographer.

The COURT. I don't think you need even do that, do you? Why doesn't somebody take the record and make physical corrections in it?

Mr. TUTTLE. For that purpose, when the time comes, I will ask for your Honor's copy so that we can make the changes.

The COURT. I have not seen my copy yet, but I will direct the stenographer to deliver it to you for the purpose of making corrections.

(Briefs to be submitted Monday, May 12, 1941.)

943 *Plaintiff's Exhibit 1 for Identification*

CC H. H. Dyke.
Ben Alexander.

OCTOBER 31ST 1932.

Mr. W. H. MASON,
Masonite Corporation, Laurel, Mississippi.

DEAR BILL: Ben and I went over to see Dahlberg this morning. We hadn't been there fore more than a few minutes before he

called in Mr. Hampson, Celotex attorney. The next man to put in an appearance was Mr. Munroe their Vice President and the next was Mr. Munch, who, as you know, is in charge of operations at Marrero. We had a very pleasant and friendly interview with the group.

We told Dahlberg that as we could see it, Judge Nields' decision hadn't left anybody with anything. Certainly under his decision there was no way in which we could license anybody and give them the necessary price protection as well as secure it for ourselves. Dahlberg's thought was by a pooling of the patents that it might be possible to set up some kind of a price control.

Mr. Hampson expressed his opinion that the only thing Judge Nields had done was to decide that a board made of bagasse did not infringe on the Masonite patents. Insofar as validating the patent for wood or where anything else was concerned he hadn't done that. He had merely dismissed the suit on the basis that bagasse made board was not an infringement. He had expressed other opinions but they did not necessarily bear on the case.

In response to some questioning they very positively ex-
944 pressed their opinion that a Court of Appeals could not reverse Judge Nields' opinion to include the whole vegetable kingdom and at the same time disregard prior art. In other words, they felt very strongly that a Court of Appeals could do one of three things: (1) Sustain the Judge's decision as is, (2) Decide that he was wrong and that bagasse is wood or woody material in the sense of the patent, or (3) Decide that the prior art did not amount to anything; but the possibility of their deciding that bagasse was wood or woody material and the prior art did not invalidate the patent was very remote.

The question of Insulite board came up and Mr. Munroe stated that he had visited the Insulite plant some two months ago. He described their process very differently from the way you reported it when you returned from International Falls and the chances are that they have changed their method. He stated that tung oil was mixed in the stock chest before the board was formed and that it was then dried in a co-drier. It was then put into a press where it was squeezed. From the press it was put into two small driers which they have constructed and which contained about 200 boards a piece. He stated that the time in the press did not exceed fifteen minutes and the probabilities are that they have changed their system in order to get greater production.

We discussed the matter of apparatus patents. It was Ben's impression as well as mine that they are afraid of these patents. However, Mr. Munch expressed himself to the effect that apparatus and mechanical patents are extremely difficult to sustain unless the infringer was a chinese copy, because there were so

many ways in which apparatus could be altered so as not to infringe.

Dahlberg requested that I give him a list of all of our patents numbers, which Ben seemed to think was all right, and which I am doing.

945 I know this letter is rather hazy but I am just trying to recall all the high points of the conversation.

It seemed to be both Mr. Hampson's and Mr. Munroe's opinion that nothing would be gained by appeal but that there was extreme likelihood of considerable being lost, that the only thing the appellate Court could do would be to either sustain or reverse Nields' opinion and that that was not an adjudication of the patent but more or less a judgment on the Judge. All of which, of course, I think is a lot of "hooey" but I don't know enough about law to express myself.

Dahlberg's whole attitude seemed to be that he was perfectly willing to do anything which was constructive in setting up some kind of an establishment which could license and control the price situation.

Whereupon we very cordially said goodby and everybody parted friendly.

Yours truly,

JAMES P. GILLIES.

yt.
CC H. H. Dyke.
Ben Alexander.

946 *Plaintiff's Exhibit 2*

MASONITE CORPORATION

OFFICE OF JAMES P. GILLIES, EXECUTIVE VICE PRESIDENT

CONWAY BUILDING, CHICAGO, ILLINOIS,
December 6th, 1933.

Mr. HAROLD C. HARVEY, *President,*
Agasote Millboard Company, Trenton, New Jersey.

My DEAR MR. HARVEY: As I told you when you were here in the office, I can't see how your selling of "longs" to ship builders and railroads direct would in any way conflict with the spirit or text of the agency agreement. It seems to me that this is entirely beside the point. We regard industrial sales as sales to companies where the board is used to fabricate some article for resale and the board is again sold in some other form. Where it is incorporated in a ship, railroad or bus for permanent use it seems to me that it is more in the nature of similar sales to the moving picture

industry, which is particularly exempted because of other reasons in the contract. I wouldn't consider that it was necessary to take up the point which you raise in either the supplemental agreement or the original agreement.

With regard to the second point which you bring up, the object to the making by the Manufacturer of freight allowances to partially offset geographical inequalities is because of the situation pertaining to Insulite and Wood Conversion and seems to me a perfectly reasonable exception. The Insulite plant is at International Falls, Minnesota, and the Wood Conversion plant is at Cloquet, Minnesota.

947 Naturally, in order to avail themselves of any particular benefit from the hardboard contract they would have to have a considerable proportion of their purchases shipped to their plants for mixing with other products in carloads. The freight to Celotex is on the basis of $1.75 per thousand feet and the freight to International Falls and Cloquet is in the neighborhood of $5.50. After the board gets to Minnesota it is somewhat but very little nearer the market than it was when it left Laurel. Our intention was to partially offset this handicap of geographical location by absorbing one-half of the difference in freight above the southern plant rate in shipments to Cloquet and International Falls only.

In other words, if either Wood Conversion or Insulite shipped to Newark warehouses they would pay for the material f. o. b. just as anybody else would. If they shipped a carload to their own plant, however, they would pay the first $1.75 and Masonite would pay one-half the costs over the bill of $1.75. Even under those conditions, Wood Conversion and Insulite would still be at a considerable disadvantage with regard to the market as compared with everybody else.

There is still another reason. The only commercial hardboard offered through the lumber dealers is being offered by Insulite and Wood Conversion and is of Insulite manufacture. We wanted some means of making the proposition to them as attractive as to any other Agent in the hope of getting everybody in the same bed and under the same blanket. I think you will agree with me that such a move would be as advantageous to the rest of our Agents as it would be to Masonite itself, especially when Masonite is paying the costs.

Yours very truly,

JAMES P. GILLIES,
James P. Gillies.

yt.

948 *Government's Exhibit 3 for Identification*

DYKE AND SCHAINES

PATENT LAWYERS

295 Madison Avenue, New York

Herbert H. Dyke.
Joseph A. Schaines.
Charles H. Kesler.

AUGUST 23, 1933.
File 2032-K-19.

Mr. JAMES P. GILLIES,
111 W. Washington Street, Chicago, Illinois.

MY DEAR JIM: As I told you over the telephone, I went to Philadelphia yesterday and saw Clerk Rowland. I found that Layton, at Huxley's instigation, had filed the paper, copy of which is enclosed and which is entitled "Motion for Stay of Mandate." He made no service upon us.

The rule of the United States Circuit Court of Appeals provides in substance that on application for certiorari the mandate will be stayed thirty days, and if the application is completed, and the Supreme Court takes it up, the stay will go on until the Supreme Court has decided the matter. There is nothing in the rule about a bond.

Clerk Rowland was going to send this Layton paper to Judge Buffington for approval or disapproval, Judge Buffington being the only Judge of the Court now in the neighborhood of Philadelphia. I asked him to hold it up until we submitted a countermotion for the Celotex Company to put up a bond if the mandate is stayed; and then went on to Wilmington and prepared the proper motion papers, copy of which is enclosed and which
949 is entitled "Motion for Bond if Mandate be Stayed." This was mailed last night to the clerk from Philadelphia and is to go to the Judge with Layton's paper. We served a copy on Layton.

If I had been in a position to supply an affidavit from you, I might have made this stronger, but the principal way that could be done would be showing how you are losing royalties which other manufacturers would like to pay for a license, but this would be "duck meat" for Huxley to refer to in making the showing he would have to make to get a certiorari: that the subject matter of this patent is one of great public interest. Accordingly, I have done nothing in this direction.

When I get the Munroe testimony you told me about over the telephone to the effect the Receivers are losing money, if the Layton application has not been disposed of in the meantime

and the circumstances seem to warrant, I may call it to Clerk Rowland's attention. However, I expect the Court will dispose of this matter on one way or the other promptly, and, in view of the Court's rule, think there is not much chance of getting a bond anyway.

Clerk Rowland told me that Layton had ordered a transcript of the record to be filed in the Supreme Court in making application for the writ; but there is no doubt that this whole matter could be stopped if you will agree to arrive at some arrangement with Dahlberg which will be mutually satisfactory.

The facts that Huxley can tell the Supreme Court that this is a case where the Judges have divided equally, two on a side, and that it is a matter of great public interest, raises something more than a marginal possibility that the Supreme Court may call it up there by a writ of certiorari. If they do take it up, the chances are that the Supreme Court will knock the patent out as it has knocked out a number of other patents in recent years.

950 I think you should get ahead with Dahlberg as fast as possible, and please keep me advised of developments.

Yours very truly,

DYKE.

HHD.EBJ.
enc.
cc Mr. Mason,
Mr. Alexander,
Mr. D. Clark Everest.

951 *Plaintiff's Exhibit 4 for Identification*

DYKE AND SCHAINES
PATENT LAWYERS
295 Madison Avenue, New York
Herbert H. Dyke.
Joseph A. Schaines.
Charles H. Kesler.

AUGUST 24, 1933.
File 2032–K–19.

Mr. JAMES P. GILLIES,
111 W. Washington Street, Chicago, Illinois.

My DEAR JIM: Enclosed is copy of a letter from Mr. G. B. Pearson, Jr., of Judge Morris' office, and copy of affidavit referred to in the letter made in support of our application for bond, and from which it appears that the receivership suit records show total

net losses, during the major part of the receivers' period of operation, in the sum of $960,730.91. This is the very best kind of evidence on this point.

You will note that Clerk Rowland has changed his mind about this and is expecting to send the papers to Judge Woolley rather than to Judge Buffington, and expects that the Judge will want the matter argued out before him.

You should understand that this matter of a bond has to do only with stay of mandate and really need have no particular effect on an application to the Supreme Court for certiorari. In the event that the stay of the mandate is made conditional upon the giving of a bond, Huxley might decide not to give a bond, but to allow the mandate to go down with injunction to issue and an accounting to be started, for, notwithstanding these, he could still go on with his application for certiorari. In such
952 event, the giving of the bond might be shifted around and Masonite might be required to give a bond as a condition to getting a mandate, the injunction and accounting.

However, as I wrote you yesterday, there ought to be some way you could get together with Dahlberg and cut out this certiorari business. I would hesitate a long time before paying you anything substantial for an assignment of anything you could get gross or net out of Celotex or the receivers; and even if you could get some money that way, it would not compare with the loss involved in case they get a certiorari and a reversal by the Supreme Court.

When Holden showed up yesterday he looked rather thin and when I asked him what the matter was he said he had been losing sleep on the possibility of the good decision of the Court of Appeals being lost by the case being certioraried up to the Supreme Court and reversed. So I am passing this information along to you; it is a shame to have Holden go into a breakdown over this situation.

I could sum up the way Holden and I look at it by saying that you have darn little to lose by getting together with Dahlberg at this time and you might have a whole lot to gain. Meanwhile, Huxley's application for a stay of the mandate will have to be held up until Judge Woolley gets back on Friday of this week, which is to say: tomorrow, August 25th.

I am sending copies of this letter to Bill Mason and Ben Alexander, together with copies of the enclosures.

Yours very truly,

DYKE.

HHD.EBJ.
enc.
cc Messrs. Mason and Alexander.

953 *Plaintiff's Exhibit 5*

MARCH 6TH, 1935.

To all Del Credere Agents of the Masonite Corporation.

PLEASE FILE WITH YOUR AGENCY AGREEMENT AND LICENSE OPTION

GENTLEMEN: It has come to the attention of the Manufacturer that a practice has arisen among some of the Agents where material is wrapped for shipment by water and delivered to the dealer that the Agent is absorbing the cost of the wrapping. Please be advised that the filed prices of the Masonite Corporation require the Agent, as well as themselves, to secure additional compensation for wrapping, at the present time the amount of $1.00 per thousand square feet surface measurement, and that such additional compensation must be obtained.

It will be considered a violation of the Agency Agreement and License Option for any agent to deliver hard board manufactured by the Masonite Corporation to any dealer and/or wholesaler and/or reserve supply company without securing the additional dollar, except for quantities shown on our price list under the L. C. L. bracket.

Yours very truly,

MASONITE CORPORATION,
JAMES P. GILLIES,
Executive Vice President.

James P. Gillies.
yt.

954 *Plaintiff's Exhibit 6*

DECEMBER 24TH, 1934.

Notice to All Agents:

GENTLEMEN: We call your attention to Article 5 of the Agency Agreement.

"The Manufacturer shall from time to time designate the minimum selling price and maximum terms and conditions of sale at which the Agent shall sell Manufacturer's products hereunder, except as provided in Section 10 hereof."

We also call your attention to the first paragraph of Section 6.

It has come to the Manufacturer's attention that certain of the agents are offering for sale hard board in carload with roofing and offering the roofing in such carloads at the carload brackets, using the lower price thus quoted on the roofing portion of the car as an inducement to secure the order.

We believe this is a violation of both the spirit and letter of the Agency Agreement.

Yours very truly,

MASONITE CORPORATION,
JAMES P. GILLIES,
Executive Vice President.

James P. Gillies.
yt.

955 *Plaintiff's Exhibit 7*

MASONITE CORPORATION

Office of James P. Gillies, Executive Vice President.

CONWAY BUILDING, CHICAGO, ILLINOIS.
December 28th, 1934.

Mr. HAROLD C. HARVEY,
Agasote Millboard Company, Trenton, N. J.

DEAR MR. HARVEY: Referring to your letter, File Number 5425, we weren't in any way shooting at your good company. We have, we believe, a lever in this Agency Agreement on Hard Board which enables us to stabilize the entire industry if properly used. We are trying to make proper use of it.

Only recently we believe one of the concerns reconsidered their decision to sell insulation on a $2 off basis because of the fact that in so doing they would jeopardize their hard board contract and they did not feel that they could get satisfactory dealer representation without hard board. More recently another concern has reconsidered their decision as to the definition of wholesalers under the Merchandising Plan for a similar reason.

The Insulation Board Code prohibits the sale of insulation at a reduced price in carload with roofing or other products which are more or less foreign to the Industry. The roofing code,
956 however, permits of giving the carload price on roofing when pooled with other products in carload. This is giving some of the boys a very decided advantage over the others and there wasn't any way under the Insulation Code that we could prevent it. We did feel, however, that we had the means here with the hard board Agency Agreement of making these fellows put roofing back on a competitive basis with the other members of the Industry.

Yours very truly,

JAMES P. GILLIES,
James P. Gillies.

yt.

957 *Plaintiff's Exhibit 8*

[Copy]

MASONITE CORPORATION
111 W. Washington St.
CHICAGO, ILLINOIS

FEBRUARY 9, 1935.

Mr. HAROLD KNAPP,
The Celotex Company, Palmolive Building,
Chicago, Illinois.

DEAR MR. KNAPP: It has recently been the painful duty of the Masonite Corporation in the protection of its own business and that of its del credere Agents to cancel the Agency Agreement and License Option of one of its del credere Agents.

In restoring this agreement to the company in question a full discussion of the entire contract was held and the resulting notice was written by Masonite and concurred in by the Agent in question before restoration of the Agency Agreement and License Option.

It is the feeling of the Masonite Corporation that this definition of its rights should be made available to all of its Agents.

Yours very truly,

(S) JAMES P. GILLIES,
Executive Vice President.

JPG:DM.

958 File this with your Agency Agreement and License Option based on United States Letters Patent owned or controlled by the Masonite Corporation covering Hardboard Products of Masonite Manufacture.

NOTICE AND WARNING

It has been brought to our attention that sales of the Hardboard Products of Masonite Manufacture have been made coincidently or in combination with the sales of other materials on such a basis that the practical result is a reduction of the price of the Hardboard Products of Masonite Manufacture below the minimum price therefor established by the Manufacturer.

The undersigned Manufacturer gives notice to its del credere Agents, that, as provided in Paragraph 5 of the Agency Agreement and License Option, it will not countenance any subterfuge, which has the effect, either directly or indirectly, of reducing the selling price of the Hardboard Products of Masonite Manufacture below the minimum selling prices and maximum terms and conditions of sale of such products established by the Manufacturer, and thereby injuring the large volume of business carried on by the Manufacturer in the manufacture and sale of the Hardboard Products of Masonite Manufacture at such established prices and

maximum terms and conditions of sale, both direct and through its del credere Agents.

The Manufacturer does not intend to and will not in any way influence or attempt to influence the prices at which any materials, not covered by its letters Patent and the Agency Agreement and License Option, shall be sold by others. But, when in conjunction with or as an inducement for the sale of Hardboard Products of Masonite Manufacture by its del credere Agents, such other materials are given to the purchaser or sold to the
950 purchaser at prices which are manifestly below the prices and maximum terms and conditions of sale at which a like quantity or quality of such other material would be sold when not accompanied by the sale of the Hardboard Products of Masonite Manufacture, this constitutes a reduction in the selling price of the Hardboard Products of Masonite Manufacture below the minimum prices and maximum terms and conditions of sale established by the Manufacturer for itself and its del credere Agents. Such an act is in violation of the Agency Agreement and License Option and constitutes a serious injury to the business of the Manufacturer and its del credere Agents. Consequently, any del credere Agent who carries on such a practice will be subject to such action, available to the Manufacturer as provided in the Agency Agreement and License Option, as will not only prevent the continuance of such practice and ensure the enforcement of the provisions of its Agency Agreement and License Option; but will preserve to the Manufacturer and its del credere Agents the full enjoyment and privileges accorded to them by the Manufacturer's patent rights.

THE MASONITE CORPORATION,
Manufacturer.

By ——— ———.

Receipt acknowledged:
By ——— ———.

CHICAGO, ILLINOIS, *February 6, 1935.*

960 *Government's Exhibit 9 for Identification*

Defendants' Exhibit A

MAY 7TH, 1935.

Mr. STERLING PEACOCK,
N. W. Ayer & Company, Field Building, Chicago, Illinois.

DEAR STERLING: I called you up on the telephone the other day with the view of enlisting your help. As you know, we have agency agreements with eight or ten of our largest competitors, all of whom are manufacturers of insulation board. Naturally, one of the most important phases of this arrangement is price

control wherein we have no advantage over our agents nor they over us. They sell our product in every instance under their own brand names.

In our industry insulation board is sold to the dealer at present on the basis of $35 per carload which is a minimum of 55,000 feet surface measurement; half carload is sold at $34; pool car, where several dealers are shipped in the same car, are sold at $36 and Less than carload quantities of 8,000 feet or less are sold at $38. In other words, a dealer who buys less than 8,000 feet is supposed to pay $38.

In the distribution of hard board, hard board can be used to make up weight in a car. In other words, a full carload can consist of a certain quantity of insulation, a certain quantity of Quarterboard and a certain quantity of hard board, the total quantity being 55,000 feet or more of all products and the dealer under those conditions would pay at the carload rate on all products.

961 We follow the bracket system in selling hard board as well as insulation. Hard board in 4 x 12's is sold to the dealer at $41 in carload quantities, all other lengths 5" or over are sold at $45 and on these two basis prices there is $1 up on the half car basis; $5 up on the pool car basis and $9 up on the L. C. L. quantities of 8,000 feet or less. As we are the manufacturers and these agents never receive title to the product which they market for us until it is delivered to the dealer or jobber, we control the prices insofar as hard board is concerned.

Through the years a practice known as pooling has grown up in the industry whereby a company which has a good many dealers in one particular section will, either with or without the knowledge of its officials, sell to several dealers and bill through one, using this device to let the small quantity buyer obtain the advantage of a carload price or approximately a carload price and thereby reduce price to the dealer. We have no control over this practice insofar as the insulation or soft board is concerned but if this practice is extended to the hard board buyer so as to enable him to buy 4 x 12's in L. C. L. quantities at $41 or $45 depending on the length, then it is a direct violation of the agency agreement and the agency agreement carries substantial penalties which should be invoked and enforced.

We have information that The Celotex Company is carrying on this practice in Boston as well as other areas. It is principally in the areas where they ship in by water, unload at some dealer's dock and then deliver by means of their own trucks, contract trucks or the dealer's trucks less than carload quantities charging the carload or approximately the carload price, thereby putting, not only ourselves, but all of our other agents at a disadvantage.

We want to get unmistakable evidence either that they are or are not doing as indicated and we are willing to spend some money to find out because without enforcement our
962 agreements will eventually result in a price breakdown of the entire structure.

We believe that we can find out when these shipments leave New Orleans, the point of origin, what boats the shipments are on and approximately when they will be due in Boston. It is our hope that N. W. Ayer can be of assistance to us either directly or through some efficient agency in securing this evidence for us and as above stated it is of extreme importance and has to be conclusive evidence so that if necessary it can stand up against attack. I am writing this letter in considerable detail at this time and sending it to you in triplicate so that you can avoid any necessity of copying in the event that you can enlist the efforts of your Boston office and they can be all ready to go when, as and if we advise them shipments are in transit. I want to repeat that this is a very serious matter with us and that we want your best advice as to the method of procedure.

Yours very truly,

JAMES P. GILLIES.

yt.

963 *Plaintiff's Exhibit 10 for Identification*

DYKE AND SCHAINES

PATENT LAWYERS

295 Madison Avenue, New York

Herbert H. Dyke.
Joseph A. Schaines.
Charles H. Kesler.

SEPTEMBER 13, 1932.
File 2032-N

Mr. JAMES P. GILLIES,
111 W. Washington Street, Chicago, Illinois.

MY DEAR JIM: A couple of years ago I spent a week or so with several parties and three other sets of attorneys on a patent license agreement where the licensor-patent owner, as well as the licensee, was engaged in manufacture of the patented articles. The licensee wanted the licensor to agree to maintain the prices the latter fixed for the former to sell at.

We all felt that if this were done it would be a violation of the Sherman or Clayton Acts under the decisions construing those laws, and it was not done. I don't want Masonite to get into any jam of this sort. My recollection of just what has been held by the

courts would need to be freshened up before I could advise you specifically on this. Shall I take the time to prepare an opinion on this?

I hoped you could get Gypsum and other prospective licensees to take this out, but find they have kept it in and
964 made it more ironclad than before. I think they would find they had to take it out if they put the proposition up to their attorneys to advise them. Let me hear from you.

Yours truly,

H. H. DYKE.

HHD:R.
"cc."
Mr. Mason.

968 *Plaintiff's Exhibit 13*

MASONITE CORPORATION

Office of James P. Gillies, Executive Vice President.

CONWAY BUILDING, CHICAGO, ILLINOIS,
June 1st, 1934.

Memorandum to all Agents of the Masonite Corporation.

GENTLEMEN: Article V of the Agency agreement gives the Manufacturer the sole right to set prices. In order that there may be no misunderstanding and in order that the Manufacturer may properly protect the interests of all Agents as well as itself, please be advised that no one is to be sold at the wholesaler price unless such wholesaler's name has previously been filed with this company and properly accredited.

Without such provision it will be entirely impossible to maintain price setup.

Yours very truly,

J. P. GILLIES,
T.
Executive Vice President.

James P. Gillies.
yt.

969 *Plaintiff's Exhibit 14*

APRIL 4TH, 1935.

Mr. BEN ANDERSON,
Laurel Office.

DEAR BEN: I have noted your letter of April 1st attaching copy of Certain-teed's letter of March 28th and this is in accordance with my understanding with Mr. Stromquist when he was through Chicago.

It will be perfectly all right for us to make a direct agreement with Certain-teed on the basis of the regular contract, except for the fact that I don't want to depart from our policy of selling our products only to those manufacturing an insulation board. We have the gates wide open enough now, and I don't want to widen them any.

For this same reason, we have agreed to sell Cornell Wood Products who are under contract with U. S. Gypsum on insulation, our products in carload quantities only, branded with their own brands, and billed to the U. S. G. Company. On all purchases by U. S. G. for their own consumption, we still continue to sell them on the same basis as in the past but on all orders which are to be branded with the Cornell Wood Products brand marks, we will bill U. S. G. on the minimum agency discount basis, which is 45% on 1/8" Presdwood and 35% on everything else. This is in order that U. S. G. an make a dime or two for themselves out of handling this business. As long as the codes are in effect, we are certainly not taking any chances on price maintenance and if Cornell should get off base, they can't do it seriously because they will never be into us for more than a carload or so at a time. I talked to John about this over the telephone.

Yours very truly,

JAMES P. GILLIES.

yt.

970 *Plaintiff's Exhibit 15*

CC Ben Alexander.

OCTOBER 16TH, 1933.

Mr. DARRELL BOYD,
134 South LaSalle Street, Chicago, Illinois.

DEAR DARRELL: We have entered into a license arrangement with the Celotex Company. We are about to enter into one with the Hawaiian Cane Products and the Armstrong Cork Company. In all probability at some later date we will enter into contracts with others.

In this agreement we retain title to the goods until sold to the dealer in order to exercise price control under a sales arrangement. On this basis it is not difficult to foresee that we will probably be doing business on consignment in about two-thirds of the States in the union. What I am getting at is this, would it not be better for us to organize a Masonite Corporation of Illinois with a capitalization of say $10,000 to handle all the agency sales or possibly all the sales for that matter insofar as the Masonite Corporation of Delaware is concerned. If we get a license as

the parent company in all these various states, we are liable to get cracked plenty on state taxes that we might avoid with a company of considerable less capital.

Am I right, or wrong, or what?

Yours very truly,

JAMES P. GILLIES.

yt.

971 *Plaintiff's Exhibit 16 for Identification Rejected by Court*

APRIL 7TH, 1932.

Mr. H. H. DYKE,
Dyke and Schaines, New York, New York.

DEAR HERB: Yesterday I sent you some papers with respect to negotiations which we are at the present time having with the U. S. Gypsum crowd.

I happened to see Mr. Henning on other matters sometime ago and told him that I understood they were coming out with a hard panel board. He said he didn't know how I knew it but that it was a fact and they expected to be on the market with it in about sixty days and that was about thirty days ago. I told him I thought they could manufacture under the Masonite patents cheaper than they could by any other method which would evade the patents and at the same time make a better profit.

I told him that after our main patent was adjudicated we would probably be willing to make arrangements to license and he suggested that insofar as their Mr. McLeish had had about fifteen years of experience in just such licensing arrangements both on the part of the Licensee and Licensor, he would be willing to draw up some kind of a dingus in the form of an agreement at which we can all shoot. What I sent you yesterday was Mr. McLeish's effort.

Mr. Darrell Boyd of Fisher, Boyden Bell Boyd and Marshall in Chicago has had considerable experience along these same lines so we have been talking the matter over with him. Of course you have a swell bunch of ideas also and I am wondering if you will take these papers, look them all over and let us have the benefit of your advice.

972 What we are trying to do is to get a standardized form of a license agreement so that when the decks are cleared we will be able to talk to these different people that are now inclined to step on our toes.

Mr. Henning told me that in 1915 they had very much the same setup on sheet rock that we now have on Presdwood. The price started out at $38.00 per thousand and wound up at $10.00. They had their first law suit five months after their patent was

granted and their last one sixteen years afterwards. He told me that they never spent less than $225,000 a year in fighting patent suits.

I have talked this over with Ernest Mehler, Ben, Clark, and Matt and they all agreed with me, that if some kind of a licensing agreement can be worked out with plenty in it for Masonite and a rallying base around which can be built the synthetic wood industry with a proper code of ethics, that it's the thing to do.

This is just in the way of explanation to let you know how our thoughts are running on this very important phase of our business life.

As ever,

JAMES P. GILLIES.

yt.

CC Ben Alexander.
W. H. Mason.
D. C. Everest.
M. P. McCullough.

973 *Plaintiff's Exhibit 17 for Identification*

(Emblem)

MASONITE CORPORATION

111 West Washington Street

Telephone: Franklin 5645

Cable Address "Masonite Chicago"

CHICAGO

E. L. Saberson, Vice President.

DECEMBER 24, 1940.

Mr. GLENN W. CHENEY,
Dant & Russell, Inc., Porter Building, Portland, Oregon.

DEAR GLENN: We have delayed somewhat in answering your letter of December 13th while we have been giving the matter some thought.

In the first place, we interpret your letter as meaning that you are only referring to situations where you take orders for shipments constituting mixed carlot quantities. Secondly, that the orders you place with us for Hardboard are to be for carlot quantities, lot marked and blocked to correspond with the amounts of

Hardboard which are to be furnished to these individual carlot buyers of mixed carlot quantities.

We can see no objection to the arrangement you propose if our understanding is correct as all it amounts to, as far as we can see, is that your shipments of mixed carlot quantities are being divided for purposes of economy in transportation. In carrying out this arrangement, however, please make accurate cross refer-
974 ence notations on the Hardboard and Insulation board orders, as we intend to make periodical audits of these transactions.

Yours very truly,

MASONITE CORPORATION,
E. L. SABERSON,
Vice President.

ELS:MS.

MASONITE PRODUCTS

Masonite Presdwood (Standard & Tempered) 1/8, 3/16, 1/4, and 5/16 inch thick.
Masonite Quartrboard (Standard & De Luxe).
Masonite Structural Insulation.
Masonite Insulating Lath, Tile and Plank.
Masonite Presdtex Wallboard.
Masonite Patterned Ceilings.
Masonite Canec Insulating Lath, Tile and Plank.
Masonite Canec Insulation.
Masonite Dubblseal Sheathing.
Masonite Presdwood Temprtile. 1/8 and 3/16 inch thick.
Masonite Century of Progress Flooring.

975 *Plaintiff's Exhibit 18*

MASONITE CORPORATION

111 West Washington Street

CHICAGO, ILLINOIS

NOVEMBER 9, 1937.

To all del credere factors:

In examination of recent inventory reports by our del credere factors, it appears that taking the aggregate situation into account there has been an increasing accumulation of "shorts" in Masonite's hard board products, and that certain of our del credere factors are experiencing some difficulty in disposing of their "shorts" inventory.

Masonite now finds itself in a position to cooperate with all of its factors in the solution of this matter. Accordingly, you are hereby advised that, commencing on November 9, 1937, and con-

tinuing until further notice, Masonite Corporation is prepared to furnish to its del credere factors the following:

1/8" Tempered and Untempered Presdwood in 4' x 8', 4' x 9', and 4' x 10' "longs";

3/16" Tempered and Untempered Presdwood in 4' x 8', 4' x 9', and 4' x 10' "longs"; and

DeLuxe Quartrboard in 4' x 8', 4' x 9', and 4' x 10' "longs"; without obligation on the factors' part to take the resultant "shorts," subject to and upon, however, the following express terms and conditions:

1. Orders will be accepted, until further notice, for the above-mentioned 4' x 8', 4' x 9', and 4' x 10' sizes in 1/8" Tempered and Untempered Presdwood, 3/16" Tempered and Untempered
976 Presdwood, and DeLuxe Quartrboard for sale by the del credere factors to dealers at Masonite's dealer prices for the respective territorial areas and quantity brackets for said "longs" as shown in its current Dealer Price Lists in effect at the time of sale, such prices to be subject to change upon like notice and in like manner as is provided in the Del Credere Factors Agreement with respect to price changes for other hard board products.

2. The compensation which may be allowed by a del credere factor to authorized jobbers, wholesalers, reserve supply companies, and authorized distributors for performance of a wholesale service will be the same as the compensation allowed for "longs" in the respective products and sizes applicable to the respective areas and quantity brackets, as set forth in Masonite's current Merchandising Plans for the respective territorial areas, or in subsequent revisions thereof.

3. On sales of said products in the above-mentioned sizes, the del credere factors' regular current commission provided for in the Del Credere Factors Agreements will be based on Masonite's current carlot list price to its dealers for 1/8" Tempered or Untempered Presdwood "longs," 3/16" Tempered or Untempered Presdwood "longs," or DeLuxe Quartrboard "longs," as the case may be, in effect in the applicable territorial area at the time of sales.

4. For the purpose of determining the applicable footage bracket and the rate of the graduated additional commission for a contract year, only the actual square footage of such "longs" shall be used in computing the aggregate square feet of hard board products sold during such contract year.

5. As to all orders placed after November 9, 1937, for 1/8" Tempered or Untempered Presdwood, 3/16" Tempered
977 or Untempered Presdwood or DeLuxe Quartrboard in 4' x 12' standard sizes, and where said boards are cut into "longs" and resultant "shorts" (whether such cutting be by Masonite Corporation at the request of the factor or by the factor

itself, as provided for in Section 9 of the Del Credere Factors Agreements), such resultant "shorts" may be sold only to the classes of trade to which the factor is permitted to sell standard sized boards and "longs." In other words, such resultant "shorts" may not be sold direct to industries for industrial use.

6. This proposal does not apply to any accumulated "shorts" on hand by, or held by Masonite for the account of, a del credere factor prior to the effective date of this proposal as above set forth, and all such "shorts" are to be sold by the del credere factor in strict accordance with the provisions of the Del Credere Factors Agreements. However, in order that Masonite may be able to carry out this proposal to the best advantage of both the del credere factors and itself, it is recommended that all further sales of such accumulated "shorts" by the del credere factors be limited to sales to recognized dealers, authorized jobbers, authorized reserve supply companies and authorized distributors.

7. All orders must be for not less than car lot quantities, but may be diversified between various hard board products and sizes as provided for in Section 3 of the Del Credere Factors Agreements.

8. This proposal is entirely voluntary on the part of Masonite and accordingly it shall not be deemed or construed to constitute a modification of the terms and provisions of the Del Credere Factors Agreements except during the time it shall remain
978 in effect, and then only to the extent herein set forth, and it is made on the understanding and subject to the condition that Masonite Corporation expressly reserves the right to modify or withdraw this proposal at any time on thirty days' prior written notice to the del credere factors, whereupon it shall cease to be in effect.

Yours very truly,

MASONITE CORPORATION,
By ——— ———, *President.*

BA:M.

979 *Plaintiff's Exhibit 19*

DECEMBER 4, 1935.

The INSULITE COMPANY,
Builders Exchange Building, Minneapolis, Minn.

GENTLEMEN: Each of our del credere agents with whom we have Agency Agreements covering the sale of our hardboard products is hereby advised that from and after this date Masonite Corporation will not approve of the appointment by a del credere agent of any additional authorized selling agents to handle Masonite products, and will not recognize the right of

any of our del credere agents to sell or consign our hardboard products to any such selling agent.

In one or two instances, our del credere agent, at the time it became such, already had one or more existing authorized selling agents. Also as to one or two of our agents who have heretofore desired to appoint certain authorized selling agents for specified territory, Masonite has, upon prior application for approval, given its approval of such appointments. This notice is not intended to disturb existing arrangements in this respect, but applies only to proposed new or additional appointments, which will not be recognized.

Yours very truly,

_____,

Vice President.

RGW:ED.

980 *Plaintiff's Exhibit 20*

[Copy]

THE CELOTEX CORPORATION

1-27-41.

ANALYSIS OF PRODUCTION OF HARD BOARD PRODUCTS

	1929	1930	1931	1932	1933	1934
Nov.		124,494	527,252	328,964	784,608	
Dec.		81,216		303,176	857,894	
Jan.		193,969	348,504	329,484	871,182	
Feb.		339,784	387,840	256,776	855,882	
Mar.		210,244	490,077	308,428	1,099,682	
Apr.		351,782	403,768		957,080	
May	223,812	187,700	525,872	553,744	1,171,084	
June	113,340	159,960	611,900	387,614	1,145,464	
July	41,635	47,112	511,745	476,150	1,146,210	
Aug.	55,125		460,160	360,189	1,187,195	
Sept.	146,292	135,868	287,236	606,115	1,075,968	
Oct.	229,374	279,298	247,943	739,584	1,008,390	
Total	809,578	2,111,427	4,801,997	4,650,224	12,160,639	

981 *Plaintiff's Exhibit 23*

SEPTEMBER 20, 1933.

Mr. J. P. GILLIES, V. P.,

Masonite Corporation, 111 W. Washington, Chicago, Illinois.

DEAR MR. GILLIES: Following up various discussions in connection with hard board manufacture and sale.

One of the main points in connection with the suggested arrangement is, of course, the sales commission, which, as I explained to you, I feel should be put on a little different basis than as

set out in the copy of the proposed contract you handed me. I am covering this in more detail in the following comments.

1—The question of schedule of patents and patent applications to be included is to be subject to a check between your patent people and ours so that only the patents pertinent to so-called hard board will be included.

2—If necessary to avoid any misunderstanding, paragraph 2 should be rewritten so that the license agreement will be specifically restricted to the so-called hard boards (or as listed in Exhibit A after the manner of paragraph 4) and so as not to include your other products, such as insulation board, etc.

3—Same comments as 2.

4—In the first paragraph, in addition to list of products as shown in Exhibit A referred to, the paragraph should include any other similar hard board products as may hereafter be brought out or manufactured by Masonite.

982 The second paragraph I think might be combined with paragraph 5 so as to have the price clause all in one paragraph.

The third paragraph, third line, after the word "manufacture" should be added the words "except as provided in paragraph No. 9."

5—Perhaps this should be rewritten so as to cover more fully the terms of the price fixing. For instance, so as to set out specifically that the minimum prices, etc., will be those at which manufacturer itself makes sales, and that the manufacturer will not depart therefrom until the list is changed on proper notice. Further, that in case of any change, the new prices shall apply to all shipments made after the ten days' notice, as provided in paragraph 4, except upon bona fide orders actually received and accepted by agent before receipt of such notice and ordered shipped by agent within thirty days after receipt of the notice. Further, that in notifying the agent of any changes in prices or terms, manufacturer shall given agent telegraphic notice thereof at the close of business of the day upon which manufacturer shall have determined to give such notice, and that manufacturer will not notify its own sales organization or trade thereof until the opening of business on the following day. Further, that such minimum prices shall not directly or indirectly be more than the prices at which manufacturer, after notice thereof given to agent, shall have determined to sell and sells its products to manufacturers on like trade in the same market, and that manufacturer shall not make any sales at prices less than those contained in such written or telegraphic notice fixing the minimum price at which agent may sell without first giving to agent telegraphic notice of its intention as provided above.

983 6—No comments.

7—First, no comments, except that settlement should be 20 days after close of the calendar month instead of 10 days.

Second paragraph, since the essence of the agreement so far as prices are concerned, is that uniform sales prices will be established and adhered to, it is obviously inconsistent to provide that the agent "may at his option increase the price of fibreboards," etc., and also inconsistent to include taxes, etc., unless the taxes referred to are specifically sales taxes, which, under the law, must be collected and reported separately. Any "hidden taxes" or indirect taxes, it seems to me must be included in the price and taken into consideration in fixing the price, otherwise there can be no uniformity in prices.

I think this paragraph should be clarified so as to specifically refer only to taxes to be separately assessed, collected and reported and shown separately on the invoices.

8—The schedule of percentages for sales compensation, it seems to me, should be uniform for all grades of board and covering all prices of board, because after all it ordinarily requires greater effort and more credit costs to sell an article for $52.00 than for $40.00, and if we are to do a good selling job for you, there must be included in the selling commission sufficient to employ men to do the job properly, and particularly I call your attention to the fact that a 35% commission for selling $30.00 quarter board does not leave very much for selling expenses when out of that commission must come freight charges. It is my opinion that a schedule starting at 40% and going up to 50% based on volume is more in line with what has to be done in order to make a workable arrangement and proper compensation for freight, selling, etc. In connection with freight, bear in mind that
984 a good deal of this stuff will probably go LCL or else have to be shipped to Marrero and then reshipped from there, entailing double freight.

My suggestion, as indicated to you yesterday, is a schedule as follows:

Quantity (Feet):	Percentage
6,000,000	40
9,000,000	42
12,000,000	44
15,000,000	46
18,000,000	48
Over 18,000,000	50

this to apply uniformly on all products except tempered material, on which the untempered basis should apply with the $10.00 tempering charge—or whatever that charge may be in the future—divided, say 25% to the agent, 75% to the manufacturer.

In your suggested basis you have a 35% discount on quarter board, regardless of quantity. It is fair, to seems to me, to make a sliding discount, based on quantity, with greater percentage as the sales go up, because the agent who is only going to sell 6,000,000 feet in a year will in all likelihood spend a lot less money per thousand for selling, rehandling, reshipping, etc., than the agent who undertakes to cover the entire country and reach out with sales of over 18,000,000 feet. Also, since quantity greatly reduces manufacturing costs, the agent should fairly and logically be entitled to a large spread as he is able by work and expenditure of money to bring up the volume.

985 In your suggested paragraph 8, on page 4, it is provided that each year's sales are to be considered separately. I understand this is not the intention, and that the second year is to start out at the break where the old one left off.

In connection with giving the agent something out of the $10.00 tempering charge, I call attention to the fact that the tempered board weighs from 10 to 15% more than untempered board, and that the agent pays this freight, for which, of course, he should be entitled to some compensation, as well as to compensation for the higher-priced sales and financing.

9—This provides that manufacturer shall not be obligated to manufacture or ship any fibreboard in a size other than 12 x 4 or in thickness than 1/8" or greater than 5/16". This is all right, except that if the manufacturer makes other sizes and thicknesses for his own trade, then similar sizes and thicknesses shall be made available to the agent under the general provisions of the contract.

Paragraph 9 as written by you provides that agent shall not be permitted to make sale of longs to any person other than dealers. This should be changed to cover also sales to U. S. Government, wholesalers, jobbers, and selling agents, such as the Rocky Mountain Celotex Company, etc. (providing such selling agents resell at the prices and terms provided in the contract), and also to manufacturers or industrials under the same prices as manufacturer may make sales of longs to manufacturers or industrials if the manufacturer does make such sales. In other words, as I understand it, your idea is that industrials will not require any sizes longer than 5', but I think you agree with me that if this situation changes and an industrial list is made for other sizes, then the same list should apply for the agent.

986 I think there is one weakness in connection with the sale of shorts, and that is that you provide for prices on shorts going to dealers, but no provision is made for prices on shorts to other than dealers. Is not this likely to lead to endless confusion

and controversy and charges of price cutting, and should you not include in your price list a price for shorts to whatever trade it is the intention to sell shorts? I expect this would make it necessary to get out two price lists the same as we have in the insulation industry—one to dealers and one to industrials, with perhaps a uniform discount or some uniform basis for wholesalers, jobbers, etc.

10—I think this paragraph should cover the situation as to wrapping, bundling, or other preparing for shipment, or else a paragraph should be added to cover this situation.

As I understand it, your delivered prices are for wrapped stock. In many instances I apprehend it would be quite difficult for us to give you specific orders for sizes, and I suppose the actual working out of the situation would lead us to carry a supply of blanks at Marrero, cutting them up as we may get small orders here and there, and then doing the wrapping. It would seem, therefore, on unwrapped material sent to Marrero for stock there should be an appropriate allowance made for wrapping, so that instead of your wrapping at Laurel we can do the wrapping ourselves in these instances at Marrero. I am making this suggestion because if in all cases we have to file orders with you for shipment from Laurel it is going to involve the situation very much, give very poor service to customers, and will very largely retard sales.

11—This should be changed to provide that marking by the manufacturer shall be done so as not to deface the material,
987 and in no way differ from the method used by manufacturer in marketing the products sold by itself.

12—In the 5th line, after the word "Masonite" should be added "or any other trade name used by manufacturer." The last sentence should also provide that manufacturer's liability shall include, when defect is one of manufacture, the freight charges involved on such defective material.

13—Report to be made on or before the 20th of the month instead of the 10th.

14—First paragraph should be changed slightly in view of our receivership situation.

In the second paragraph no comments, except that the last sentence should provide that the manufacturer shall refund to the agent all advances made by the agent to or for account of the manufacturer, and, in addition thereto, freight rates applicable to the shipments.

15—First paragraph, no comments.

Second paragraph, in case of orders in excess of manufacturing capacity, all orders shall be scaled down and filled on a pro-rata basis. In other words, the capacity to be pro rated equally between all sellers, including the manufacturer.

16—It seems to us that the license fee suggested is entirely too high, and also that the royalty provided in the proposed royalty contract is too high. A fee of $200,000.00 in connection with 10% royalty on selling price, in my opinion, is more than the traffic can stand.

17—No comments.

18—Third line after the word "which" add the word "such."

988 19—No comments.

20—No comments.

21—No comments.

Exhibit A. No comments, except add $30.00 price on quarter board 4 x 6 and 4 x 12. Also what do the designations "B&B" and "#2" mean? Also, should not price be quoted on quarter board shorts, and should not also a schedule be prepared for prices to wholesalers, jobbers, reserves, federal and state governments, industrials, manufacturers, etc.?

Also, in connection with Exhibit A, what about tolerances? In other words, a 4 x 12 board, if it is exactly 4 x 12, would not cut into a 4 x 8 and a 4 x 4. This question of tolerances does not come up where the boards are cut at your plant, but where the 4 x 12 blanks are taken to Marrero and there recut the same allowance for saw curf must be made at Marrero as you make yourself at your plant.

In connection with this list, also tempered tile should be included, but I understood you to say that you would prefer to include this in a separate letter. Also the same perhaps with your floorings.

Schedule for patents and applications should be checked over between your legal department and ours, and the schedule restricted to the pertinent patents covering the making of hard board so that we will not get into any controversy between ourselves as to insulation board or anything not involved in the specific patents or items covering hard board and similar articles contemplated by the agreement.

As to Exhibit B: Paragraph 1 should be restricted to hard boards, etc. Same with paragraph 2.

Paragraph 5, settlement should be made the 25th of the month instead of the 10th.

989 A royalty of 10% on such material as building material seems awfully high, and in my judgment impractical, but I presume that is a matter of business judgment on which something could be said on both sides. In my opinion, however, the royalty license at $200,000.00 cash and 10% royalty

would simply mean that the license would never be availed of, at least that is the way I look at it now. I would seriously suggest that you give your figures some further consideration.

The provision in paragraph 5 that licensee shall have no right to manufacture or sell boards of larger area than 4 x 12 seems to me impractical, because I know if we set up machinery to make hard board our present idea would be to put in 4 x 18 blanks, not 4 x 12.

No comments about paragraph 6, except the same comments as in connection with 5, that is that the minimum of $50,000.00 per year looks awfully high, and of course settlement within 10 days after the end of the year is too quick a time for accounting. It should be at least 40 days, and the report should be on the 25th instead of the 10th.

Paragraph 8 should be confined to the hard board products only.

Same for paragraph 9.

Paragraph 11: If licensor does not determine to protect infringements, then what?

Paragraph 14, the second paragraph it seems to me must be eliminated unless it is restricted closely to improvements on Masonite patents.

Paragraph 16 should be rewritten so as to make it plain that if default is cured within the time limit, the license shall automatically continue, and in this connection, 30 days is too short a time on such an important contract as this. It should be at least 90 days.

In connection with this subject, the following items
990 should be covered perhaps by a separate letter, and not in the contract:

1—Dismissal of the suits without cost to either party.

2—An understanding that in the event you grant any contract to others on terms or conditions more favorable than included in the contract to be executed between your company and ours, then we shall at our option be entitled to have the contract amended, inserting therein such more favorable terms, or by otherwise making the agreement conform to the provisions of such other agreements.

If the points mentioned above can be satisfactorily ironed out, I would be prepared to personally recommend to our people the making of a contract with you accordingly.

Yours truly,

BGD B.

991 *Plaintiff's Exhibit 24*

(Emblem)

Johns-Manville
JM
Products

JOHNS-MANVILLE
22 East 40th Street
NEW YORK, N. Y.

SEPTEMBER 5TH, 1933.

Mr. JAMES P. GILLIES, *Executive Vice President,*
Masonite Corporation, Conway Building, Chicago, Illinois.

DEAR MR. GILLIES: I am very glad to acknowledge your letter of August 29th, not only because it makes our own Company feel better about this situation but I am sure your action will also result in more stabilized conditions in the Insulating Board market. I am leaving for Chicago this afternoon to attend a sales meeting and if I have time before I return to New York, will try to discuss this subject further with you.

Very truly yours,

JOHNS-MANVILLE SALES CORPORATION,
C. F. AMES, JR.,
C. F. Ames, Jr., *Mgr., Dealer Bldg. Mtls.*

CFA.
H.

992 *Plaintiff's Exhibit 25*

(The word Copy appears across face of the three sheets of this exhibit.)

LEWIS & CARSON
135 South LaSalle Street
CHICAGO

Re Masonite Corporation—New del credere agreement

OCTOBER 20, 1936.

Mr. PAUL A. WARD,
c/o Wood Conversion Company, First National Bank Building, St. Paul, Minnesota.

DEAR MR. WARD: In line with the conference which you and Mr. Davis had with Mr. Alexander, Mr. Wallace, Mr. Saberson and

myself at St. Paul relating to the new del credere agreement I have prepared a supplemental letter agreement covering the following points discussed at our conference.

(a) Masonite's agreement to impose on its own dealers, wholesalers, jobbers, etc., the same standard of requirements it is at the time imposing on the Factor;

(b) Masonite's agreement to act with due diligence on appointments proposed by the Factor;

(c) Masonite's agreement to give notice of nonavailability of Black Tempered Presdwood and Concrete Form Board, which are special products and which may not always be available;

(d) Agreement relating to insurance requirements and accepting your "floater" type of insurance and your agreement to indemnify against loss;

993 (e) Revision of the del credere agreement so as to adjust the graduated annual commission on total quantities to a contract year basis conforming to Masonite's fiscal year, and which as stated to you at St. Paul will be an adjustment favorable to the Factor.

The matter of freight allowances to partially offset geographical inequalities is being handled by a separate letter inasmuch as the making of such allowance in your case (as well as in the case of Insulite and Johns-Manville) is an exception to the "Most Favored Nation" section and is therefore a matter which does not need to be submitted to the other del credere agents.

The matter of samples is being taken care of by a separate letter from Mr. Wallace to Mr. Davis. His letter outlines the practice which Masonite has heretofore pursued and is, of course, willing to continue.

I believe this covers all points referred to in our St. Paul conference except the one point expressed by Mr. Davis that he could not find anywhere in the del credere agreement an express covenant by Masonite to maintain its own prices, terms and conditions of sale and brackets. I pointed out to Mr. Davis certain language in the agreement which I thought should satisfy him on this point. In Section 5 on printed page 6 of the new del credere agreement Masonite expressly covenants that the respective prices, terms, and conditions fixed for the Factor will be the same prices, terms, and conditions at which it is selling or making offers of sale to its own dealers, jobbers, etc. This, together with the definitions of minimum selling prices, conditions of sale, etc., and the intent of the agreement taken as a whole, make it perfectly apparent that Masonite must just as scrupulously observe prices, terms and conditions of sale and quantity brackets fixed by it as must its del credere Factors. As a legal matter it would seem highly

994 unwise to insert an expressly spelled out provision to maintain prices, etc., which might be construed as an agreement by both companies in direct violation of the Anti-Trust Laws. I think it is much safer to limit this strictly to an agency contract rather than insist on an express covenant which might be construed as getting outside the field of agency and illegal. We, therefore, are asking Mr. Davis to waive that point and accept our agreement that as a principal we will respect our own prices, terms, conditions, etc., as a matter of protection to our agents.

Accordingly you will now find enclosed herewith:

1. Two printed copies of the del credere agreement, duly executed by Masonite, with date left blank.

2. Two copies of the above mentioned supplemental letter agreement, duly executed by Masonite, plus a third unexecuted copy for your files, with dates likewise left blank.

3. Two copies of the above mentioned separate letter with respect to freight allowances duly executed by Masonite, with date left blank, plus a third unexecuted copy for your files.

4. A letter from Mr. Wallace to Mr. Davis explaining the method of handling samples.

5. Three copies of escrow agreement for the escrow of the above mentioned documents (other than Mr. Wallace's explanatory letter with respect to samples, which does not need to be placed in escrow) pending our procuring of the signing up of the remaining del credere agents, executed by Masonite, plus a fourth unexecuted copy for your files.

Except as to the escrow agreement, the above mentioned documents are undated and should be left undated for escrow purposes.

995 If the foregoing has your approval it will be in order for your company to execute the two copies of the printed del credere agreement, the two copies of the supplemental letter agreement, with respect to freight allowances and the three copies of the escrow agreement. You should retain one executed copy of the escrow agreement. Two copies of the escrow agreement together with the two copies of each of the other agreements should then be forwarded by you direct to Harris Trust and Savings Bank 115 West Monroe Street, Chicago, Illinois, marked for the attention of Mr. Mann, Corporate Trust Department. Or you may, if you care to do so, send the documents to me whereupon I will at once place them in escrow. If you send them direct to Harris Trust and Savings Bank, please send me a copy of your covering letter to that bank so that I may know when the documents have been sent.

As we told you we have Celotex, National Gypsum and Hawaiian Cane signed up. I had word this morning from Arm-

strong-Newport that they are all satisfied and ready to sign. So far as we know everything was satisfactorily ironed out with Insulite and the documents are being held for Mr. Robinson's signature. We are anxious to get these all in escrow just as promptly as possible so that we can take them all down for dating and delivery between now and October 31.

Trusting that the various enclosures will have your approval and thanking you and Mr. Davis in advance for your prompt attention to the matter, I am

Yours very truly,

FL:KR.

Enc.

995–A *Plaintiff's Exhibit 29*

THE CELOTEX CORPORATION

Gross Domestic Sales of Masonite Hardboard Products for the Eight Fiscal Years Ended October 31, 1933 to 1940, Inclusive

Fiscal year	Total sales	Sales to dealers, wholesalers, and gov't agencies	Sales to industrial users
1940	$1,145,695.85	$1,145,695.83	$0.02
1939	1,219,972.41	1,219,232.41	740.00
1938	1,208,760.89	1,204,804.14	3,956.75
1937	1,413,895.30	1,395,688.36	18,206.94
1936	1,138,868.60	1,122,468.47	16,400.13
1935	901,826.83	880,726.91	21,099.92
1934	594,851.52	586,101.13	8,750.39
1933	806.80	806.80	
	7,624,678.20	7,555,524.05	69,154.15

995–B *Plaintiff's Exhibit 30*

OCTOBER 16, 1936.

HARRIS TRUST AND SAVINGS BANK,

115 West Monroe Street, Chicago, Illinois.

GENTLEMEN: The undersigned are herewith delivering to you, as escrow agent, the following:

1. Del credere Factor's Agreement between the undersigned, Masonite Corporation, a Delaware corporation, as party of the first part, and Armstrong-Newport Company, a Delaware corporation, as party of the second part, duly signed in duplicate by each of the undersigned, the date thereof being left blank;

2. Supplemental Letter from Masonite Corporation to Armstrong-Newport Company, duly signed in duplicate by Masonite Corporation and accepted in duplicate by Armstrong-Newport Company, referring to the clarification of certain points in the

above mentioned del credere Factor's Agreement, the date of said letter and the date of acceptance thereof being left blank.

You are hereby authorized and directed to hold the above described instruments in escrow for subsequent delivery upon the following terms and conditions:

First. Upon deposit with you of:

1. Del credere Factor's Agreement between Masonite Corporation and the following del credere agents, to wit:

The Celotex Corporation,
Johns-Manville Sales Corporation,
National Gypsum Company,
Insulite Company,
Wood Conversion Company, and
Hawaiian Cane Products, Ltd.,

which agreements shall be duly signed by the respective parties thereto, either dated or with date left blank; and

2. A certificate of Masonite Corporation signed by its President or Vice President stating that each of the above mentioned del credere Factor's Agreements are of substantially like tenor as the del credere Factor's Agreement herewith deposited with you, you will (1) fill in the dates in each copy of the said instruments described in items "1" and "2" hereof where the date thereof has been left blank as hereinabove noted, the date to be so filled in to be the date on which the last of the above mentioned del credere Factor's Agreements with the above mentioned other del credere Factors shall be deposited with you, and (2) deliver one copy of said Agreement and Supplemental Letter mentioned in items "1" and "2," supra, to each of the undersigned.

The undersigned hereby agree that upon delivery by you of the aforesaid Agreement and Supplemental Letter in accordance with the foregoing instructions, said Agreement and Supplemental Letter shall be and become effective between the undersigned as of the date so filled in by you.

Second. In addition to the authority hereinabove set forth, but not in limitation thereof, you are also authorized to fill in the dates in said Agreement and Supplemental Letter where the date thereof has been left blank as hereinabove noted and deliver one copy of said Agreement and Supplemental Letter to each of the undersigned, upon a joint order signed by each of the undersigned specifying the date to be so filled in and directing such delivery.

The undersigned hereby agree that upon delivery by you of the aforesaid Agreement and aforesaid Supplemental Letter pur-

suant to such joint order, said Agreement and said Supplemental Letter shall be and become effective between the undersigned as of the date so filled in by you pursuant to instructions contained in such joint order.

Third. Notwithstanding the foregoing provisions relating to delivery and effective date, it is understood and agreed that unless delivery out of escrow shall have been made prior to December 1, 1936, the execution of said del credere Factor's Agreement and Supplemental Letter deposited herewith shall, at the option of either of the undersigned, exercised by written notice to the escrow agent, be without further force or effect, and thereupon the escrow agent shall forthwith cancel said Agreement and Supplemental Letter by stamping or writing the word "cancelled" over the signatures appearing on each copy of said documents and surrender one copy of each thereof to Masonite Corporation and the other copy of each thereof to Armstrong-Newport Company.

It is understood that you shall be entitled to reasonable compensation for your services hereunder, which the undersigned, Masonite Corporation, agrees to pay. It is further understood and agreed by the undersigned that the escrow herein provided for is accepted by you upon the express condition that no liability shall attach to you or your agents by reason of any act done or omitted to be done in the exercise of good faith, and that you shall not in any manner be required to examine into the validity of any agreements placed in escrow or be in any manner responsible for the genuineness of the execution of any agreement to be deposited with you or of the signatures thereon.

This letter is signed in triplicate, one signed copy being deposited with you, and a signed copy being retained by each of the undersigned.

Yours very truly,

MASONITE CORPORATION,

(Signed) By R. G. WALLACE, *Vice-President.*

ARMSTRONG-NEWPORT COMPANY,

(Signed) By H. R. PECK, *Vice-President.*

The above escrow is hereby accepted and the receipt of the signed instruments above described in items "1" and "2" is hereby acknowledged this 26 day of October 1936.

HARRIS TRUST AND SAVINGS BANK,

Escrow Agent.

(Signed) By F. O. MANN, *Asst. Secretary.*

995–C *Plaintiff's Exhibit 33*

WEDNESDAY, MARCH 28, 1934.

Mr. I. J. HARVEY, *President,*
The Flintkote Company, 100 East 42nd Street,
New York, N. Y.

DEAR IKE: I acknowledge receipt of your letter of the thirteenth. I am just back from Florida where I had a nice vacation of two weeks.

In the first place, I want to congratulate you on your promotion to the Presidency of The Flintkote Company and also congratulate the Flintkote Company on acquiring your services. I trust we will have many pleasant contacts during the future years.

As to the contents of your letter, I have not yet had an opportunity to discuss it with the Masonite boys. However, I can assure you if Masonite makes any additional sales agreements that you will certainly be at the head of the list.

There are several things that sort of muddy the waters that we will have to iron out. In the first place, we told our dealers we were licensing only members of the Insulation Institute and we have adhered strictly to that policy, with the exception of Certain-teed who are handling our Presdwood but our direct contract is with the Canec Company, who are, as you know, insulation manufacturers. In the second place, our present licensees do not look with favor upon our taking on additional distributors. In the third place, our own dealers have naturally been opposed to having so many additional agencies selling our Presdwood products. We have, however, managed to keep everybody on base and happy but the thing that worries me is that if we take on additional people it might be the straw that will break the camel's back. However, I will discuss it with the boys at Masonite on my first trip down there and the first time you are in Chicago or I am in New York, we can talk it over fully.

I note carefully the third paragraph of your letter which might smooth the way for us somewhat and give us some out with our other licensees. And if you do desire to take on some insulation board, suggest that you contact Arborite. These people make an excellent board, are looking for a sales outlet and could probably ship their product by boat to the west coast. Of course, Canec would be an ideal outfit for you to work with on the west coast but I do not suppose they would make any other tie-up outside of Certain-teed. Both of these boards are excellent insulation boards and would have no sales resistance.

Note your comment on Firtex. I think your calculations are absolutely sound and I would stay away from them.

As I stated previously, I will be in Chicago in the next ten days and discuss this matter fully with the boys at Masonite and then make an appointment so we can definitely conclude as to whether or not it is possible for us to work out a contact with you.

Yours very truly,

BEN ALEXANDER.

H.

996 *Defendants' Exhibit O*

To be Made Effective:
(Name illegible)
GENERAL HQTRS

65.2-397.

SALES BULLETIN

GENERAL HEADQUARTERS,
March 15, 1934.

To Building Material and General Salesmen: Boston, Metropolitan, and Philadelphia Districts Only.

J-M ASBESTOS FLEXBOARD

After many months of research and experiment, a new asbestos board product has been developed and perfected. J-M Asbestos Flexboard is this entirely new development. Made under a new process, it has distinctive features which make it far superior to old-style asbestos boards and give it competitive advantages over wood fiber boards for many uses.

NUTSHELL FACTS ABOUT FLEXBOARD

1. Fireproof—In the degree of its fireproofness, Flexboard is outstanding. Tested under the specification of U. S. Quarantine Station, Sabine Pass, Texas, which requires that the material show a Modulus of Rupture of not less than 1000 lbs. per sq. inch after subjection to flame for 7 minutes, ¼" Flexboard more than passed the strength requirement: Wood fiber boards subjected to the same test were consumed and could not be tested for strength.

997 2. Flexible—One of the objectionable features of the old-style asbestos wallboards was their brittleness and tendency to shatter when subjected to shock. Flexboard, as the name implies, is highly flexible. It will bend and stand abuse to a degree far greater than anyone ever expected of an asbestos-cement board. When used in construction work, it has sufficient strength and flexibility to withstand all ordinary handling.

3. Hardness—Flexboard being made of a mixture of asbestos and cement is hard and in this respect no one need worry about the surface being subject to abrasion or marring.

4. Workability—The workability of Flexboard has been increased considerably over that of the old-style asbestos wallboard. Sawing is readily accomplished with an ordinary carpenter's hand saw and nails can readily be driven close to the edge without cracking or breaking. In short, it can be cut and nailed just about like any other wallboard product.

5. Permanent—After alternate wetting and drying and after three cycles of alternate freezing and thawing, Flexboard was as good as new with no tendency towards disintegration.

Form X-140A Printed in U. S. A.

65.2-397
#2

998 Appearance—The new process under which Flexboard is produced makes possible a marked improvement in appearance. Flexboard has a pleasing buff color and a "grain" or texture which makes it one of the most attractive finishing boards on the market. Because of its fine appearance it will be used in many instances without additional finish.

Paintability—Flexboard is comparable in paintability with wood, and like wood, requires a prime coat of linseed oil for best results. It can, of course, be painted with cold water paints without previous treatment.

Sizes, Weights, Wrapping, etc.

Thickness: 1/16", 5/8" and 3/16".

Size: 4' x 8'.

Weights: 1/16"—.62 lb. per sq. ft.; 1/8"—1.13 lb. per sq. ft.; 3/16"—1.68 lb. per sq. ft.

Wrapping: Flexboard is shipped wrapped unless specifically ordered otherwise. Regular prices include wrapping and no allowance will be made if shipped in bulk unwrapped.

Packaging schedule is as follows:

Thickness	Number Sheets per package	Square feet per package	Weight per package
1/16"	6	192	124 lb.
1/8"	4	128	145 lb.
3/16"	3	96	162 lb.

999 Flexboard Sales Policy—Flexboard will be sold under a dealer sales policy. Sales to industrials for construction uses will be made only at prices higher than those to dealers. Equipment accounts will be sold on the same basis as dealers which means that dealers who buy in carloads can resell at L.C.L. prices to equipment accounts who buy in small quantities.

How Flexboard will be Distributed—Flexboard will be produced at Nashua and stocked at Nashua and Manville. It will therefore be available for shipment as follows:

1. In full cars out of Nashua.
2. In mixed cars with roofing out of Manville.
3. L.C.L. out of Manville or Nashua.

65.2–397
#3

Flexboard Prices—Freight Allowed:

Size	Thickness	Square feet in carlot	Carload price	L.C.L. price
4'x8'	1/16"	64,500	$45.00	$53.00
4'x8'	1/8"	36,000	55.00	65.00
4'x8'	3/16"	23,500	67.00	80.00

1000 All board will be shipped wrapped, at the above prices, unless otherwise specified and no allowance will be made if shipped unwrapped.

All prices F. O. B. shipping point, freight allowed to destination.

Flexboard shipped in mixed cars with roofing takes the carload price regardless of quantity. It also takes the same freight rate.

Service Distributor Commission—Commission of 5% will be allowed to the Service Distributor on Straight or mixed shipments direct to dealers. No commission will be paid on shipments to Service Distributor's stock.

The Flexboard Market—Flexboard answers every purpose of ordinary wall board and, in addition, has qualities of being fireproof and permanent. Therefore, the potential market is of a tremendous size.

Flexboard is strong, flexible, good looking and is easily finished. That fits it for partition finishing, building extra rooms and all the run-of-mine uses of wall board.

On top of that it is fire proof, making it the material for wall board uses wherever fire hazard is a factor—for basement ceilings, garage lining, attic rooms and dozens of uses in commercial and semi-commercial buildings.

Flexboard, highly resistant to moisture, has dozens of outdoor uses. The market for Flexboard for both inside and
1001 exterior finishing of summer camps and cottages should be a volume market in itself. Every dealer in every summer resort section should sell Flexboard, stressing the protection it affords against grass and brush fires on the outside and oil stove fires within.

There are Flexboard uses on every hand, in cities and towns, for interior uses and exposed to the weather, for homes and com-

65.2–397
#4

mercial buildings. Every dealer in your territory is a prospective Flexboard account.

Remember these facts about Flexboard—It is a unique material in the wallboard market. Here is a product you can talk about without having every salesman that follows you duplicate your story.

Flexboard is another leader for your use in selling the whole J-M line.

There is a market for Flexboard in every town and city regardless of size.

Flexboard can be shipped in mixed cars with roofing and takes the carload price regardless of quantity.

Samples, 4" x 6", are available on requisition. Familiarize yourself with the product, equip yourself with samples, and make full use of Flexboard with your trade while it is news.

Flexboard is ready for shipment immediately.

C. F. AMES, Jr.

1002 *Defendants' Exhibit P*

To Be Made Effective:

W. L. ROWE
GENERAL HQTRS.
SALES BULLETIN

Supplement "A" to 65.2–397
GENERAL HEADQUARTERS,
April 24, 1934.

To All Offices and All Salesmen, Atlanta, Cincinnati, Cleveland, Chicago, Milwaukee, St. Louis, and New Orleans Districts only:

J-M ASBESTOS FLEXBOARD

After many months of research and experiment, a new asbestos board product has been developed and perfected—J-M Asbestos Flexboard. Made under a new process, it has distinctive features which make it far superior to old-style asbestos boards and give it competitive advantages over wood fibre boards for many uses.

NUTSHELL FACTS ABOUT FLEXBOARD

1. Fireproof—In the degree of its fireproofness, Flexboard is outstanding. Tested under the specification of U. S. Quarantine

Station, Sabine Pass, Texas, which requires that the material show a Modulus of Rupture of not less than 1000 lbs. per sq. inch after subjection to flame for 7 minutes, ¼" Flexboard more than passed the strength requirement. Wood fibre boards subjected to
1003 the same test were consumed and could not be tested for strength.

2. Flexible—One of the objectionable features of the old-style asbestos wall boards was their brittleness and tendency to shatter when subjected to shock. Flexboard, as the name implies, is highly flexible. It will bend and stand abuse to a degree far greater than anyone ever expected of an asbestos-cement board. When used in construction work, it has sufficient strength and flexibility to withstand all ordinary handling.

3. Hardness—Flexboard, made of a mixture of asbestos and cement, is hard and in this respect no one need worry about the surface damage or marring under abrasion.

4. Workability.—The workability of Flexboard has been increased considerably over that of the old-style asbestos wallboard. Sawing is readily accomplished with an ordinary carpenter's hand saw and nails can readily be driven close to the edge without cracking or breaking. In short, it can be cut and nailed just about like any other wall board product.

5. Permanent—After alternate wetting and drying and after three cycles of alternate freezing and thawing, Flexboard was as good as new with no tendency toward disintegration.

Appearance—The new process under which Flexboard is
1004 produced makes possible a marked improvement in appearance. Flexboard has a pleasing buff color and a "grain" or texture which makes it one of the most attractive finishing boards on the market. Because of its fine appearance it will be used in many instances without additional finish.

Paintability—Flexboard is comparable in paintability with wood, and like wood, requires a prime coat of linseed oil for best results. It can, of course, be painted with cold water paints without previous treatment.

Sizes, Weights, Wrapping, etc.

Thickness: 1/16", ⅛", and 3/16".

Size: 4' x 8'.

Weights: 1/16"—.62 lb. per sq. ft.; ⅛"—1.13 lbs. per sq. ft.; 3/16"—1.68 lbs. per sq. ft.

Wrapping: Flexboard is shipped wrapped unless specifically ordered otherwise. Regular prices include wrapping and no allowance will be made if shipped in bulk unwrapped.

Packaging schedule is as follows:

Thickness	Number sheets per package	Square feet per package	Weight per package
1/16"	6	192	124 lb.
1/8"	4	128	145 lb.
3/16"	3	96	162 lb.

1005 Flexboard Sales Policy—Flexboard will be sold under a dealer sales policy. Sales to industrials for construction uses will be made only at prices higher than those to dealers. Equipment accounts will be sold on the same basis as dealers which means that dealers who buy in carloads can resell at L. C. L. prices to equipment accounts who buy in small quantities.

How Flexboard will be Distributed—Flexboard will be produced at Nashua and stocked at Nashua. Wkn. & Gretna and Manville. It will therefore be available for shipment as follows:

1. In full cars out of Nashua.
2. In mixed cars with roofing out of Manville. Wkn. & Gretna.
3. L. C. L. out of Manville, Nashua, Waukegan and Gretna.

Flexboard Prices—Freight allowed:

Size	Thickness	Square feet in carlot	Carload price	L.C.L. price
			Per M sq. ft.	*Per M sq. ft.*
4' x 8'	1/16"	64,500	$45.00	$53.00
4' x 8'	1/8"	36,000	55.00	65.00
4' x 8'	3/16"	23,500	67.00	80.00

1006 All board will be shipped wrapped, at the above prices, unless otherwise specified and no allowance will be made if shipped unwrapped.

All prices F. O. B. shipping point, freight allowed to destination.

Flexboard shipped in mixed cars with roofing takes the carload price regardless of quantity. It also takes the same freight rate.

Service Distributor Commission—Commission of 5% will be allowed to the Service Distributor on straight or mixed shipments direct to dealers. No commission will be paid on shipments to Service Distributor's stock.

The Flexboard Market—Flexboard answers every purpose of ordinary wall board and, in addition, has qualities of being fireproof and permanent. Therefore, the potential market is of tremendous size.

Flexboard is strong, flexible, good looking and is easily finished. That fits it for partition finishing, building extra rooms and all the run-of-mine uses of wall board.

On top of that it is fire proof, making it the material
1007 for wall board uses wherever fire hazard is a factor—for basement ceilings, garage lining, attic rooms and dozens of uses in commercial and semi-commercial buildings.

Flexboard, highly resistant to moisture, has dozens of outdoor uses. The market for Flexboard for both inside and exterior finishing of summer camps and cottages should be a volume market in itself. Every dealer in every summer resort section should sell Flexboard, stressing the protection it affords against grass and brush fires on the outside and oil stove fires within.

There are Flexboard uses on every hand, in cities and towns, for interior uses and exposed to the weather, for homes and commercial buildings. Every dealer in your territory is a prospective Flexboard account.

Remember these facts about Flexboard—It is a unique material in the wall board market. Here is a product you can talk about without having every salesman that follows you duplicate your story.

Flexboard is another leader for your use in selling the whole J-M line.

There is a market for Flexboard in every town and city regardless of size.

1008 Flexboard can be shipped in mixed cars with roofing and takes the carload price regardless of quantity.

Samples, 4″ x 6″, are available on requisition. Familiarize yourself with the product, equip yourself with samples, and make full use of Flexboard with your trade while it is news.

Flexboard is ready for shipment immediately.

C. F. AMES, Jr.

1009 *Defendants' Exhibit Q*

To Be Made Effective:

SALES BULLETIN

W. L. ROWE

GENERAL HQTRS

65.2–429

GENERAL HEADQUARTERS,
August 8, 1934.

To *Building Material & General Salesmen Except Coast and Canada:*

J-M ASBESTOS FLEXBOARD

We have always felt that there are uses for Flexboard which probably have never occurred to most of us, so that the potential market is larger than any of us have realized. Following out this

thought, we have checked up on a number of sales of Flexboard to ascertain the use to which the material was put. Replies were most interesting. Some of these were as follows:

1/8" Flexboard—used for lining an elevator shaft.

1/8" Flexboard—used in construction of a fur storage vault.

1/16" material—used to line the ceiling of an ice cream factory where the metal ceiling rusted out because of the salt and damp air.

1/8" Flexboard—used as a truck body liner.

1/8" Flexboard—used as table tops.

1/8" Flexboard—used for lining milk houses.

1/8" Flexboard—used for protecting walls from the direct heat of stoves.

1010 3/16" Flexboard—used for fireproof sheathing.

3/16" Flexboard—used as a sheathing in a moving-picture theatre.

3/16" Flexboard—used as a sheathing in the pasteurizing rooms of a milk company.

3/16" Flexboard—used for gable ends on houses.

1/8" Flexboard—used for lining chicken-coops.

3/16" Flexboard—used for lining on metal hot air ducts.

1/8" and 3/16" Flexboard—used in constructing roadside stands and overnight cabins.

Flexboard used as lining on walls of a large canned-soup plant.

Flexboard used for lining the boiler room of a school.

The above will give you an indication of the wide varieties of uses and large market for Flexboard which we have already tapped. Two districts have large jobs pending where Flexboard may be used for partitions in college buildings. You, too, will find it worth while to push the sale of this material because it answers a long felt want at a reasonable price and there is nothing else like it on the market.

C. F. AMES, Jr.

1011 *Defendants' Exhibit R*

To Be Made Effective:

SALES BULLETIN

6-2-1066

GENERAL HEADQUARTERS,
February 15, 1941.

To Building Material & General Salesmen (Except Coast & Canada):

J-M DELUXE ASBESTOS FLEXBOARD

It is with a great deal of satisfaction that we announce the addition to the line of Johns-Manville DeLuxe Flexboard.

This is a new high-gloss finish Flexboard which the Research and Factory Departments have been working on for over a year. You men have heard rumors of it for some little time and have been expectantly awaiting its release. We feel confident that the reception it will receive from you and your trade will well reward the patience you have shown.

To begin with, DeLuxe Flexboard is not just another tile board. Unlike competitive materials which are fabricated on a Hardboard base, DeLuxe Flexboard is made on a base of asbestos and cement which has been specially waterproofed. As a result, moisture that might penetrate through the back and edges of the sheet, cannot swell and blister the surface as so often happens with the ordinary tile boards fabricated on a Hardboard base. The asbestos cement sheet has the further advantage of providing fire protection which, of course, cannot be had from the competitive wood fiber products.

The finish provided on DeLuxe Flexboard sets it apart from any of the ordinary tile boards. The Vinylite primers 1012 which are used are practically the same as those used on asbestos wainscoting and provide comparable, durable qualities. (DeLuxe Flexboard installed according to specifications may be used successfully in shower stalls and bathrooms.) In addition, the high-gloss surface of DeLuxe Flexboard is remarkably resistant to stains that might be caused by various materials found in bathrooms and kitchens such as butter, fruit juices, lard, coffee, Listerine, iodine, etc. Specially developed lacquers are baked on to the sheets to provide them with this exceptionally high-gloss, mirror-like surface. The spraying and baking operations required for the manufacture of DeLuxe Flexboard made necessary the designing of special air-conditioned spray rooms and ovens in order to insure a glossy surface free from blemish. We mention this because so many of the so-called tile boards on the market are not manufactured with the same degree of care, with resultant suffering in quality, durability, and appearance.

DeLuxe Flexboard gets away from competition in another respect also. It makes no attempt to imitate tile. Rather, it sets a style of its own—modern and smart, coupled with beauty and durability. DeLuxe Flexboard will be furnished in eight colors, viz: Black, White, Ivory, Blue, Green, Peach, Yellow, and Red. There will be three styles of sheets—4′ x 8′, plain; 4′ x 8′ with horizontal scoring on 12″ centers and 4′ x 4′ with 12″ x 12″ box scoring. We have purposely kept away from the typical 4″ x 4″ title scoring in line with our thought that this new product is not attempting to imitate tile. As a result of our experience on the Pacific Coast where DeLuxe Flexboard has

been on the market for almost a year, we have found that the large box scoring and the horizontal scoring have practically eliminated the demand for 4" x 4" tile scoring. We appreciate that it may be necessary to meet special requests for 4" x 4" scoring in certain markets and we will make this style available on special order via the SPPI procedure.

1013 The installation of DeLuxe Flexboard is not unlike the installation of other types of Flexboard. The attached direction sheets should be carefully studied so that there may be no misunderstanding of our recommendations. Please note particularly, the instructions under the heading, "Waterproofing." It is also important that dealers and applying mechanics understand the proper methods to be used in cutting sheets. Because of the hard gloss-like surface it is recommended that where necessary to cut sheets they should first be scored with a sharp scoring tool along the line where the cut is desired. It is then possible to saw along the scored lines, holding the saw as flat as possible. This insures a smooth, clean cut without jagged edges.

There are certain accessories essential to a proper job of installation, depending upon which method is employed.

Flexboard cement is a special type of adhesive that has unusual "gripping" power and one that will retain its tackiness over a long period of time. The instructions on the attached sheet should be carefully followed when application is made by the adhesive method. Please note that we do not recommend adhesive application without supplementary mechanical fastening.

The same 1" nickel-plated drive-screw button head nails now recommended for use with Standard and Decorative Flexboard may be employed in the application of DeLuxe Flexboard.

Joint cement will be available in both Gray and White. It will be packed in cartons containing twenty-four 2 oz. cans of one color only. Two ounces of joint cement are sufficient to take care of 16 lineal feet of joint.

J-M aluminum moulding is also recommended for use in the erection of DeLuxe Flexboard.

1014 In connection with the sale and distribution of DeLuxe Flexboard, we plan to provide an attractive dealer display. One of these displays will be furnished free with every initial stock order of five hundred square feet or more, or it may be purchased by a dealer for $2.00. In addition, there will be available, a leather binder containing samples of both DeLuxe and Decorative Flexboard. These binders are for the use of our own salesmen, dealers and dealer salesmen and will be available to the trade at a cost of $1.00 a piece. Requisitions for both the

dealer displays and the salesmen's kits should be placed on the Sales Promotion Department.

We will also have a small leaflet for the use of our dealers, containing color swatches of the eight different finishes. The only loose samples we plan to make available are small 2" x 2" pieces which may be requisitioned from Nashua Factory at a cost of $3.20 per hundred pieces.

J-M DeLuxe Flexboard will be sold on the same merchandising plan established for all other Flexboard products. F. O. B. prices for Nashua, Manville, Waukegan, and Marrero are indicated on the attached price sheet. Please note that DeLuxe Flexboard may be combined with Standard and Decorative Flexboard to obtain the 10% discount provided for 1,000 square foot quantities.

We are convinced that this new Flexboard is a superior product in every respect to the tile boards currently sold in your market. In establishing our price structure, it was not anticipated that we would be competitively priced with some of the cheap boards that are on the market. Our price structure, however, is competitive with the better grades of competition but even these cannot be compared in quality, appearance, or durability with J-M DeLuxe Flexboard.

L. H. BRENNAN.

1014–A *Defendant's Exhibit U*

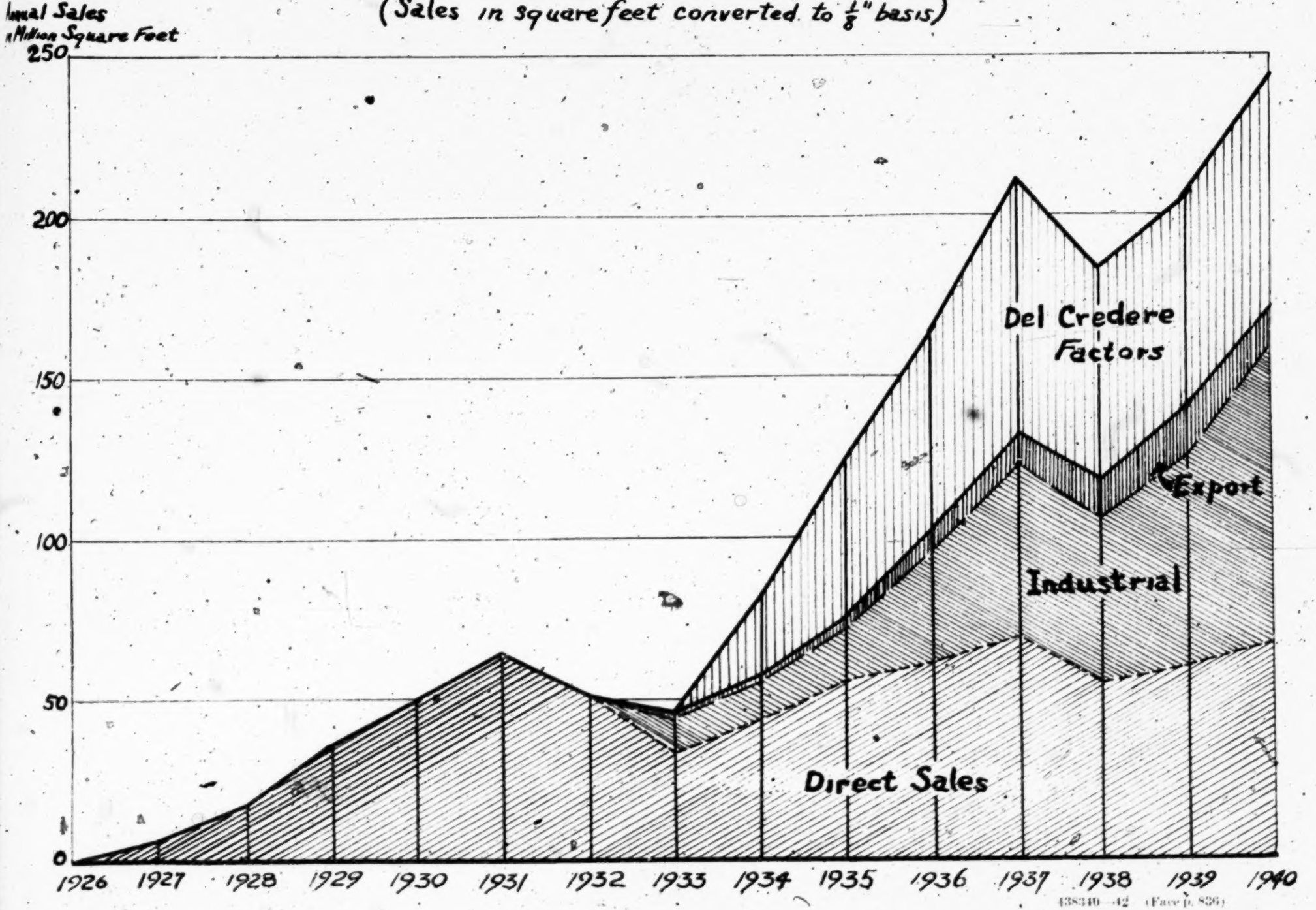


1014-B

Defendant's Exhibit V

Breakdown of Masonite's Hardboard Sales by Outlets, 1927-1940

(Sales in square feet converted to $\frac{1}{8}$" basis)

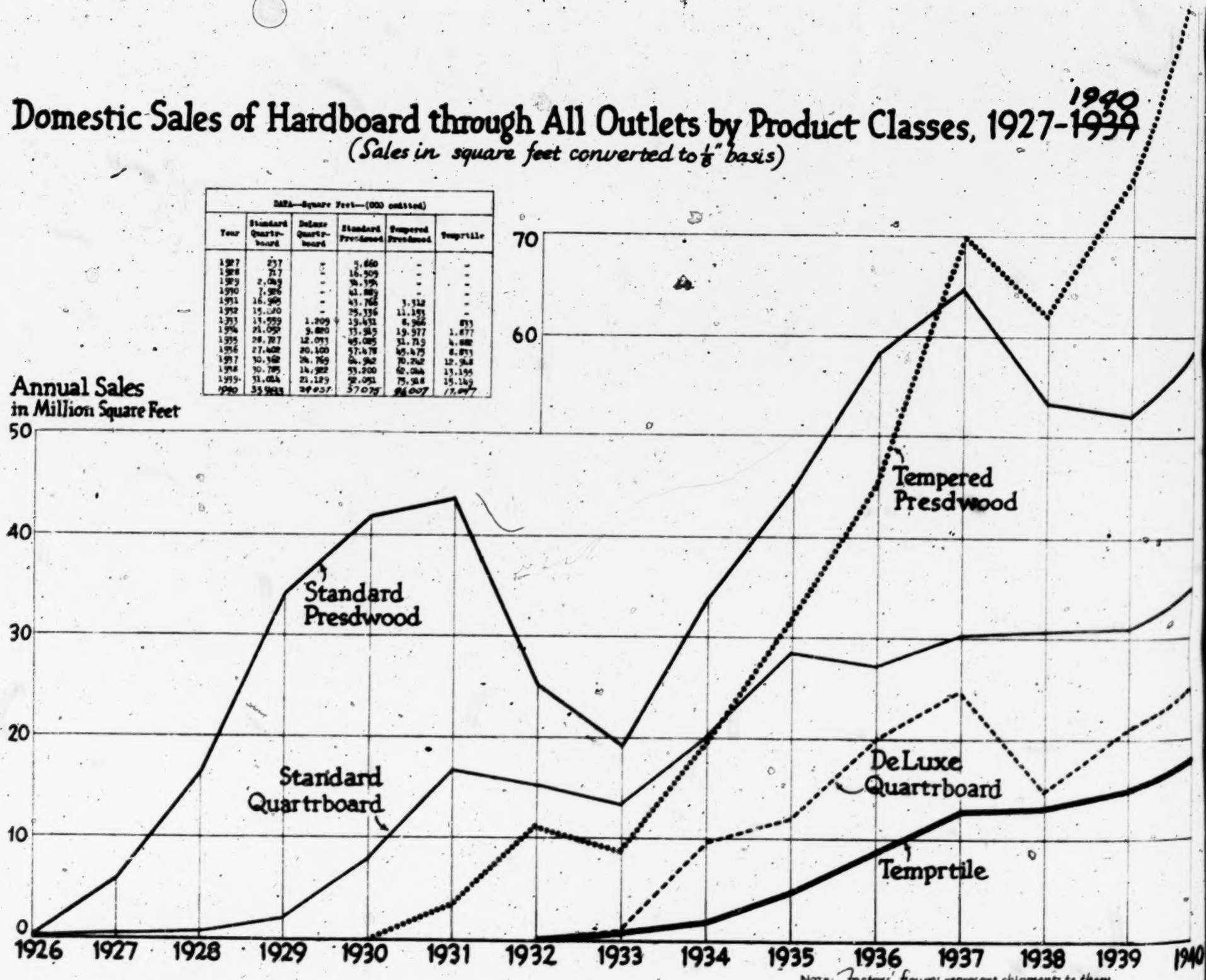


Domestic Sales of Hardboard through All Outlets by Product Classes, 1927-1940

(Sales in square feet converted to 1/8" basis)

DATA—Square Feet—(000 omitted)

Year	Standard Quartrboard	Deluxe Quartrboard	Standard Presdwood	Tempered Presdwood	Temprtile
1927	237	-	5,660	-	-
1928	717	-	16,509	-	-
1929	2,049	-	34,199	-	-
1930	7,586	-	41,889	-	-
1931	16,985	-	43,766	3,112	-
1932	15,080	-	25,336	11,151	-
1933	13,959	1,209	19,431	8,966	873
1934	21,052	3,880	33,585	19,977	1,877
1935	28,787	12,093	45,085	31,719	4,882
1936	27,468	20,100	37,478	45,475	8,893
1937	30,582	24,769	24,962	70,262	12,968
1938	30,795	14,382	53,200	62,044	13,195
1939	31,084	23,129	32,051	75,584	15,169
1940	35,9833	29037	57075	86,007	17,097



Note: 'Factory' figures represent shipments to them

1014–E *Exhibit SS–7*

Analysis of Net Graded Production of Hardboard

(All Footage Figures Converted to ⅛" Basis)

Fiscal year ended Aug. 31	Quartrboard			Presdwood [1]		
	Production	Off-grade	% off-grade	Production	Off-grade	% off-grade
1928	477,116	54,196	11.4	11,317,394	1,788,352	15.8
1929	2,675,120	660,760	24.7	42,295,743	11,572,739	27.4
1930	9,080,482	775,806	8.5	53,262,516	5,690,468	10.7
1931 [2]	20,792,896	1,358,032	6.5	50,465,648	8,468,162	16.8
1932 [2]	20,324,093	2,409,885	11.9	39,508,990	7,779,551	19.7
1933 [2]	18,089,263	1,462,740	8.1	35,511,398	5,043,091	14.2
1934 [2]	25,921,071	1,429,316	5.5	68,770,687	8,847,019	12.9
1935	26,184,256	276,894	1.1	102,028,786	5,766,786	5.7
1936	35,813,354	325,548	.9	150,282,476	8,118,736	5.4
1937	27,658,080	1,383,700	4.8	190,243,526	10,793,992	5.7
1938	36,139,760	1,827,300	5.1	169,963,664	18,550,472	10.9
1939	29,314,821	1,876,142	6.4	158,023,611	14,920,899	9.4
1940	36,962,692	3,253,024	8.8	241,190,978	27,763,503	11.5

[1] Presdwood figures include all thickness of Presdwood and De Luxe Quartrboard converted to ⅛" basis.
[2] Culls included with off grade and total production.

1014–F *Exhibit SS–14*

Excerpts From Standard Specifications for Temporary Housing

WAR DEPARTMENT—OFFICE OF THE QUARTERMASTER GENERAL

1700–E

Standard.
9–9–40.

Carpentry

1. Scope.—This work includes the furnishing of material and equipment and performing labor necessary to do all carpentry shown on drawings or specified.

See "General Conditions," "Special Conditions," and "Bid Form."

2. Materials shall conform to the following specifications:

E. Wallboards:

E–1. Gypsum—Fed. Spec. SS–W–51a, Type A, ½" Thick.

E–2. Asbestos Millboard—Fed. Spec. HH–M–351, Grade A, ¼" thick.

E–3. Insulating—Fed. Spec. LLL–F–321a, Class A, ½" thick.

E–4. Pressed Wood Fiberboard shall be not less than 3/16" thick and shall, in all respects, be equal to the boards listed below.

For walls, ceilings, and partitions	For wainscots	Manufactured by—
Quartrboard	De Luxe Quartrboard	Masonite Corp.
Studio-Board	Panel Board	Celotex Corp.
Dualboard	De Luxe Dualboard	Insulite Co.
Panlboard	De Luxe Panlboard	Johns-Manville Co.

54. Options:

A. Gypsum Wall Board may, at Contractor's option, be used in lieu of Insulation board wherever insulating board is indicated on drawings or specified.

"Pressed wood Fiberboard may, at Contractor's option, be used in lieu of insulation board or Gypsum Board, except in heater rooms, duct shafts, projection booths or other locations where fire protection is required.

"Installation of Pressed Wood Fiberboard shall be as specified on Page 30, Par. 52 for installation of insulation board."

Concrete and Brickwork

1. Scope.—The work under this heading consists of furnishing all materials and equipment and performing necessary labor to do all concrete and brick work shown on the drawings or specified.

All foundation walls and piers shall in all cases by constructed of concrete as hereinafter specified, notwithstanding that in certain instances the drawings indicate concrete blocks or wood posts.

See "General Conditions," "Special Conditions," and "Bid Form."

2. Materials shall conform to the following:

A. Form material shall be lumber of No. 2 Common Grade or better, plywood not less than 5/8" thick, or form lining of tempered fiber board not less than 1/8" thick.

Source—PP. 2, 20, 22, 31, & AD 3.

1014–G

Exhibit SS–16

SUMMARY OF INSULATION AND HARDBOARD SALES, 1933

(Insulation Board Footage Converted to ½" Basis; Hardboard to ⅛" Basis)

In square feet	Insulation			Hardboard
	Own mfg.	Purchased or sold as agent	Total	
Armstrong Cork Co	22,159,829		22,159,829	
Celotex Co. (Receivers)	108,348,632		108,348,632	[1] 11,790,767
Certain-teed Products Corp		9,484,464	9,484,464	
Dant & Russell, Inc				
Flintkote Co				
Insulite Co	45,079,072		45,079,072	[2] 4,363,763
Johns-Manville Sales Corp		13,822,000	13,822,000	
Masonite Corp	14,448,636		14,448,636	45,388,950
National Gypsum Co		10,752,944	10,752,944	120,132
Wood Conversion Co	18,670,165		18,670,165	
In dollars				
Armstrong Cork Co	379,923.40		379,923.40	
Celotex Co. (Receivers)	2,809,411.52		2,809,411.52	[1] 372,894.18
Certain-teed Products Corp		261,434.21	261,434.21	
Dant & Russell, Inc				
Flintkote Co				
Insulite Co	1,026,862.24		1,026,862.24	[2] 156,579.49
Johns-Manville Sales Corp		394,100.00	394,100.00	
Masonite Corp	498,900.91		498,900.91	1,609,176.78
National Gypsum Co		260,362.35	260,362.35	4,830.26
Wood Conversion Co	511,831.41		511,831.41	

NOTE.—Totals of the above data would be inaccurate because of differences in fiscal years and because of intercompany transactions.

[1] Celotex figures include their own hard panel board almost exclusively. Their fiscal year ended October 31, and so included only 22 days operation under the "Del Credere Agency Agreement."

[2] Insulite's figures are for the hardboard of their own manufacture in this year.

1014–H *Exhibit SS–17*

SUMMARY OF INSULATION AND HARDBOARD SALES, 1936

(Insulation Board Footage Converted to ½" Basis; Hardboard to ⅛" Basis)

In square feet	Insulation			Hardboard
	Own Mfg.	Purchased or sold as Agent	Total	
Armstrong Cork Co	31, 814, 571		31, 814, 571	2, 693, 261
Celotex Corp	276, 472, 262		276, 472, 262	26, 071, 049
Certain-teed Products Corp		27, 493, 809	27, 493, 809	5, 716, 965
Dant & Russell, Inc				
Flintkote Co				
Insulite Co	101, 329, 153		101, 329, 153	6, 310, 080
Johns-Manville Sales Corp	38, 305, 350	606, 650	38, 912, 000	(1)
Masonite Corp	28, 526, 121	6, 417, 188	34, 943, 309	164, 436, 257
National Gypsum Co		12, 440, 449	12, 440, 449	2, 188, 546
Wood Conversion Co	55, 400, 151		55, 400, 151	5, 571, 198
In dollars				
Armstrong Cork Co	763, 051. 00		763, 051. 00	119, 042. 81
Celotex Corp	7, 780, 316. 90		7, 780, 316. 90	1, 149, 991. 58
Certain-teed Products Corp		736, 999. 43	736, 999. 43	242, 922. 92
Dant & Russell, Inc				
Flintkote Co				
Insulite Co	2, 453, 056. 07		2, 453, 056. 07	256, 378. 71
Johns-Manville Sales Corp	1, 120, 950. 00	20, 550. 00	1, 141, 500. 00	252, 803. 00
Masonite Corp	802, 074. 44	188, 721. 34	990, 795. 78	5, 035, 981. 89
National Gypsum Co		310, 670. 22	310, 670. 22	92, 385. 19
Wood Conversion Co	1, 668, 806. 48		1, 668, 806. 48	245, 154. 50

NOTE.—Totals of the above data would be inaccurate because of differences in fiscal years and because of intercompany transactions.

[1] Footage figures for hardboard by Johns-Manville's Fiscal Years not available

1014–I

Exhibit SS–18

SUMMARY OF INSULATION AND HARDBOARD SALES, 1940

(Insulation Board Footage Converted to ½″ Basis; Hardwood to ⅛″ Basis)

In square feet	Insulation			Hardboard
	Own mfg.	Purchased or sold as agent	Total	
Armstrong Cork Co	28,072,350		28,072,350	3,476,696
Celotex Corp	382,133,420	5,245,077	387,378,497	24,442,961
Certain-Teed Products Corp		17,894,062	17,894,062	4,187,522
Dant & Russell, Inc	61,711,809		61,711,809	(1)
Flintkote Co		38,250,700	38,250,700	3,953,669
Insulite Co	137,777,057		137,777,057	6,122,711
Johns-Manville Sales Corp	97,484,000		97,484,000	(2)
Masonite Corp	51,439,878	8,683,360	60,123,238	243,717,897
National Gypsum Co	61,431,625		61,431,625	7,512,934
Wood Conversion Co	82,596,479		82,596,479	7,904,615
In dollars				
Armstrong Cork Co	740,702.00		740,702.00	134,008.00
Celotex Corp	12,617,531.81	263,256.45	12,880,788.26	1,212,064.79
Certain-Teed Products Corp		544,747.31	544,747.31	186,078.19
Dant & Russell, Inc	1,888,497.20		1,888,497.20	(1)
Flintkote Co		919,641.00	919,641.00	187,287.00
Insulite Co	3,683,177.00		3,683,177.00	302,172.00
Johns-Manville Sales Corp	2,703,000.00		2,703,000.00	412,500.00
Masonite Corp	1,588,312.18	274,951.36	1,863,263.54	7,821,797.55
National Gypsum Co	1,484,471.00		1,484,471.00	316,062.95
Wood Conversion Co	2,555,996.51		2,555,996.51	391,457.30

NOTES.—Totals of the above data would be inaccurate because of differences in fiscal years and because of intercompany transactions.

[1] Hardboard sales data other than as shown by Masonite (Exhibit S–56) are not available for Dant & Russell, Inc.

[2] Hardboard footage figures for Johns-Manville's fiscal year not available.

1014-J *Exhibit SS-19*

ANNUAL SALES OF INSULATION BOARD AS REPORTED BY MEMBERS OF THE INSULATION BOARD INSTITUTE

Year:	Footage ½" basis	Year—Continued.	Footage ½" basis
1929	413,464,000	1935	377,126,000
1930	400,231,000	1936	532,642,000
1931	293,298,000	1937	584,508,000
1932	167,245,000	1938	496,222,000
1933	191,730,000	1939	687,349,000
1934	207,047,000	1940	852,569,300

MEMBERS OF INSTITUTE REPORTING

Armstrong Cork Co.
Celotex Corp.
Certain-Teed Products Corp.
Cornell Wood Products Co.
Flintkote Co.
Insulite Co.
Johns-Manville Sales Corp.
Masonite Corp.
National Gypsum Co.
U. S. Gypsum Co.
The Upson Co.
Wood Conversion Co.

121. In United States District Court for the Southern District of New York

[Title omitted.]

Motion to strike

Comes now the plaintiff and moves to strike from each of the narrative statements of testimony filed by each of the defendants listed below the paragraph or paragraphs indicated, on the ground that said paragraph or paragraphs contain self-serving declarations as to the intent, purpose and motive of the defendants which are not material or relevant to any issue in this case:

1. Insulite Company—Paragraph 18 (a), printed page 313, Official Record;

2. Celotex Corporation—Paragraph 7, printed page 351, Official Record;

3. Johns-Manville Sales Corporation—Paragraph 6, printed page 443, Official Record;

4. Certain-teed Products Corporation—Paragraph 13, printed page 383, Official Record:

5. Armstrong Cork Company—Paragraph 44, printed page 373, Official Record.

Dated: New York, N. Y., May 1, 1941.

(S) HUGH B. COX,
Hugh B. Cox,
Special Assistant to the Attorney General.

(S) MARCUS A. HOLLABAUGH,
Marcus A. Hollabaugh,
(S) ROBERT C. BARNARD,
Robert C. Barnard,
Special Attorneys.

1016 In United States District Court, Southern District of New York

Civ. 7-498

UNITED STATES OF AMERICA, PLAINTIFF

vs.

MASONITE CORPORATION, CELOTEX CORPORATION, CERTAIN-TEED PRODUCTS CORPORATION, JOHNS-MANVILLE SALES CORPORATION, INSULITE COMPANY, FLINTKOTE COMPANY, NATIONAL GYPSUM COMPANY, WOOD CONVERSION COMPANY, ARMSTRONG CORK COMPANY, AND DANT & RUSSELL, INC., DEFENDANTS

Appearances: Thurman Arnold, Esq., Assistant Attorney General, for Plaintiff; Hugh B. Cox and Samuel E. Isseks, Esqrs., Special Assistants to the Attorney General; and Marcus A. Hollabaugh and Robert C. Barnard, Esqrs., Special Attorneys of Counsel.

Messrs. Breed, Abbott & Morgan, Attorneys for Masonite Corp.; Charles H. Tuttle, Louis Quarles, Fletcher Lewis, Herbert H. Dyke, Thomas E. Kerwin and John M. Coates, Esqrs., of Counsel.

Messrs. Leboeuf, Machold & Lamb, Attorneys for Armstrong Cork Co.; Walter F. Kaufman, Horace R. Lamb and Craigh Leonard, Esqrs., of Counsel.

Messrs. Cravath, Degersdorff, Swaine & Wood, Attorneys for Celotex Corporation; Andrew J. Dallstream and T. A. Halleran, Esqrs., of Counsel.

Messrs. Hughes, Richards, Hubbard & Ewing, Attorneys for Certain-Teed Products Corp.; Oscar R. Ewing and William T. Gossett, Esqrs., of Counsel.

1017 Davis, Polk, Wardwell, Gardiner & Reed, Attorneys for Johns-Manville Sales Corp.; Porter R. Chandlen and Taggart Whipple, Esqrs., of Counsel.

Messrs. Sullivan & Cromwell, Attorneys for Flintkote Co.; Allen W. Dulles and William Piel, Jr., Esqrs., of Counsel.

Messrs. Milbank, Tweed & Hope, Attorneys for Insulite Co.; Timothy N. Pfeiffer and Grenville S. Sewell, Esqrs., of Counsel.

Elmer E. Finck, Esq., Attorney for National Gypsum Co.; Elmer E. Finck and Henry K. Urion, Esqrs., of Counsel.

Lawrence C. Hull, Jr., Esq., Attorney for Dant & Russell, Inc. and Wood Conversion Company; Lawrence C. Hull, Jr. and Charles W. Briggs, Esqrs., of Counsel.

Opinion

COXE, D. J.:

This is a suit by the United States to enjoin Masonite Corporation, Celotex Corporation and eight other corporations from further alleged violations of the Sherman and Clayton anti-trust laws (15 U. S. C. A. 1, 2 & 14).

The complaint charges that in the manufacture and distribution of "hardboard," a synthetic wood product, the defendants have been, and still are, engaged in a conspiracy (1) to restrain trade in violation of Section 1 of the Sherman Act (15 U. S. C. A. 1); and (2) to monopolize trade in violation of Section 2 of the same Act (15 U. S. C. A. 2). It is also charged that various agreements between the defendants are in violation of Section 3 of the Clayton Act (15 U. S. C. A. 14).

The case was tried largely on agreed facts. These were supplemented by some oral and some stipulated testimony. There is, however, no serious dispute with respect to any of the essential facts.

The principal attack of the Government concerns the alleged violation by the defendants of Section 1 of the Sherman Act (15 U. S. C. A. 1).

The term "hardboard" is widely understood to mean the patented product manufactured by Masonite Corporation under the basic Mason patent, No. 1,663,505, issued March 20, 1928; this product is to be distinguished from insulation board, which is a softer board produced in different ways by various manufacturers, and not directly involved in the present litigation.

Hardboard is a homogeneous, hard, dense, grainless fiber board product made from wood or woody material. It is used in the building industry as wall board, for decorative panelling, for exterior covering, for waterproof panelling in kitchens and bathrooms, for flooring and subflooring, for ceilings, and for forms

into which concrete is poured; in addition, it has found increasing use in other industries, such as the furniture, toy, advertising, pleasure boat, automobile, and motion picture industries.

1018 In 1925, Mason, the inventor of hardboard, was instrumental in organizing the Masonite Corporation (then called Mason Fibre Company) to exploit the invention. This corporation established a manufacturing plant at Laurel, Mississippi, and it was there that the first commercial production of hardboard took place in 1926. Since then, the annual production at the Laurel plant has greatly increased, the net dollar volume in 1940 amounting to $7,821,397.55.

The Celotex Company (predecessor of the present defendant Celotex Corporation) was, as far back as 1920, a pioneer in the development of structural insulation; it had a large plant at Marrero, Louisiana, where its insulation products and other building materials were manufactured and it distributed these products through a vast number of local lumber dealers throughout the country.

In or about 1929, the Celotex Company started the manufacture at its Marrero plant of a hard panel board made from bagasse, a sugar cane fiber, which it proceeded to sell in competition with the Masonite hardboard. The Masonite Corporation at once charged the Celotex Company with infringement of a number of its patents, including patent No. 1,663,505, and in 1931 instituted suit against the Celotex Company in the District Court in Delaware for infringement of patent No. 1,663,505. This suit was bitterly contested by the Celotex Company, and resulted in a decision by the Circuit Court of Appeals for the Third Circuit on July 6, 1933, holding two product and four process claims of the patent valid and infringed. Masonite Corporation v. Celotex Co., 66 F. (2d) 451. The Masonite Corporation was thus left with a final decision adjudicating the validity of a number of basic claims of the patent, and construing these claims with a sufficient breadth to cover the Celotex product made from bagasse.

While the infringement suit was pending, the Celotex Company went into the hands of receivers, and the business was still being conducted by the receivers when the decision of the Circuit Court of Appeals came down on July 6, 1933. The problem then confronting the Celotex receivers was a serious one, for it was realized that if the decision stood, the Celotex Company would be cut off from a supply of hard panel board to round out its line of building products, and it would have to face a large claim by the Masonite Corporation for damages and profits. It was also felt that there was little chance that the decision would be reviewed by the Supreme Court because of the absence of conflicting rulings in different circuits. See Triplett v. Lowell, 297 U. S. 638, 644.

The problem for the Masonite Corporation was likewise a difficult one even though it had succeeded in the patent litigation; the credit of the company was seriously impaired, the operations at the Laurel plant were almost at a complete standstill, and urgent measures were required to keep the business alive. What the company particularly needed was a larger national distribution of its products, and it was realized that this could only be obtained by securing a much greater number of dealer contacts than the company possessed. Celotex had these contacts, and it was thought that some settlement of existing differences between the two companies might be worked out by which the Celotex dealer contacts would be made available to the Masonite Corporation in the distribution of hardboard products. It was with this mainly in view that negotiations looking to a settlement were opened with the Celotex receivers, and, after considerable discussion, the terms of an agreement were arrived at, which, in effect, accepted the decision of the Circuit Court of Appeals with respect to the patent, released the Celotex Company from any claims of the Masonite Corporation for damages or profits, and constituted the Celotex Company an agent of the Masonite Corporation to sell Masonite hardboard products.

1019 . The agreement between the two companies was signed on October 10, 1933; it was executed by one of the Celotex receivers acting under court authority, and on the conclusion of the reorganization proceedings relating to the Celotex Company in 1935, the agreement was assumed by the new Celotex Corporation, one of the present defendants. Similar agency agreements were subsequently executed in 1933 by Masonite Corporation with National Gypsum Company, Johns-Manville Sales Corporation, Armstrong-Newport Company (a subsidiary of Armstrong Cork Company), and Hawaiian Cane Products, Ltd. Each of these corporations was engaged in manufacturing and selling building products, and all needed the Masonite patented hardboard to complete their respective selling lines. The remaining defendants (other than the Masonite Corporation) later executed agency agreements with the Masonite Corporation containing terms substantially identical with those of the agreements in force at the time with the other selling agents.

In the operation of the first agency agreements there were minor controversies between the Masonite Corporation and the various agents with respect to the meaning of certain provisions of the agreements, and on Oct. 29, 1936, supplemental agreements were executed with all of the then existing agents clarifying the language on the disputed points. These supplemental agreements did not in any way change the agency relationships created by the earlier agreements, and continued to be operative

until after the present suit was started, when an effort was made to remove from the agreements a number of provisions which had been criticised by the Government. This resulted in the preparation of an entirely new agency agreement, which was executed separately by all of the agents, dated March 20, 1941, but which did not actually become effective until April 1, 1941.

The Government insists that these various agency agreements, executed from time to time by the defendants, are not true agency agreements; that they are illegal under the antitrust laws because they regulate the prices at which hardboard products may be sold by the different agents; and that further operations by the defendants under the agreements should be enjoined.

The critical question is whether the agreements are true agency agreements, for, if they are, it cannot be doubted that the case is controlled by the decision of the Supreme Court in United States v. General Electric Company, 272 U. S. 476. In the determination of this question, it will be sufficient merely to consider the first Celotex agreement of October 10, 1933, which, in all material respects, is identical with the other early agreements. These early agreements present the case for the Government more favorably than the recent 1941 agreements, and a decision against the Government with respect to them will also dispose of the Government's criticism of the 1941 agreement.

The Celotex 1933 agreement is entitled "Agency Agreement" and refers to the parties as "Manufacturer" and "Agent." The hardboard products, which are the subject of the agreement, are defined as those covered by the Masonite patents. The agent is appointed "as a del credere factor," and authorized to sell the "hardboard products manufactured" by the manufacturer throughout continental United States and Hawaii. There is a covenant by the agent "to promote the sale of hard boards manufactured by the manufacturer," and one by the manufacturer "to manufacture such of its products," as are shown on an attached exhibit, "in standard sizes therein shown," in such quantities as may be reasonably "required by the agent to enable it to fill its orders." The prices at which the agent is allowed to sell are regulated by the agreement; it is provided that the "manufacturer shall from time to time designate the minimum selling price and maximum terms and conditions of sale at which the agent shall sell manufacturer's products"; these "minimum prices and maximum terms of sale" are required to be the same as the regular list prices and terms of sale from time to time established by the manufacturer for direct sales to its customers, and they cannot be changed except on 10 days' previous notice to the agent.

1020

Paragraph 7 of the agreement reads as follows:

"The manufacturer agrees to ship hard boards in accordance with the orders and specifications of the agent. Said agent agrees that on direct shipments to the agent said hard boards shall be received and held on consignment, and that the title thereto shall remain in the manufacturer until sold by the agent."

Paragraph 8 provides that within 20 days after the close of the calendar month "in which the order is shipped by the manufacturer" one-half of the difference "between the list price thereof and the agent's discount shall be advanced by the agent," and that the balance shall be paid within 20 days after the close of the calendar month "in which such shipment is made of hard board products sold by the agent to its customers." It is further provided in the paragraph that the agent shall be responsible for and pay "all necessary freight or transportation costs" and "all sales or similar taxes, excises, or charges * * * directly levied, imposed, or charged * * * in respect of the sale of products sold and distributed by the agent." There is also a provision that the agent shall, at its own expense, "carry adequate insurance against usual hazards covering all products consigned to it," and that "all policies shall, if required by the manufacturer, be payable to the agent and to the manufacturer as their respective interests may appear."

Paragraph 9 specifies the compensation to be paid to the agent "by way of commission on each sale of products sold."

Paragraph 10 provides that the "manufacturer shall not be obligated to manufacture or ship any hard board in a size more than 12′ by 4′"; the manufacturer will, however, "if indicated by the agent at the time of placing the order, cut each board into not more than two pieces"; the resultant "long" and "short" pieces are to be sold by the agent at the manufacturer's list prices but under certain restrictions.

Paragraph 11 provides that "if the agent or its customers so desire, the manufacturer will, without extra cost, brand or mark all hard boards with such agent's or customer's name or trade-mark or other indicia as may reasonably be requested by the agent." It is also provided that the agent will not use "the trade names 'Masonite' or any of the trade-marks of the manufacturer, including the trade names 'Presdwood,' 'Quartrboard,' 'Temprtile,' and 'Tempered Presdwood.'" Under paragraph 12 the manufacturer reserves the right to place patent markings on all hardboard products sold by the agent.

Paragraph 14 reads as follows:

The agent agrees to report on or before the twentieth day following the close of each calendar month to the manufacturer

on forms furnished by the manufacturer, giving an inventory of all products consigned to the agent and on hand and unsold at the end of said month in such detail as may reasonably be requested by the manufacturer."

Paragraph 15 allows the manufacturer to terminate the agreement on a default by the agent, or in the event that the agent shall fail to have ordered a stated amount of hardboard products for any six months period, or if the agent shall be adjudicated bankrupt or insolvent or go into receivership. The agreement may, however, be cancelled entirely by the agent on six months' written notice to the manufacturer.

1021 The concluding clause of the paragraph reads as follows:

"In event of termination of this agreement for any reason, the agent shall fully comply up to the date of the termination period and shall at said time purchase and pay for all products consigned to it and unsold, or at the option of the manufacturer shall return all or so much thereof as it may request. On all goods returned, the manufacturer shall refund to the agent all advances made by the agent to or for the account of the manufacturer in respect of such goods, including freight and reasonable handling charges."

Paragraph 16 reads in part as follows:

"The manufacturer shall not be required to accept orders or deliver hardboard products in excess of its manufacturing capacity, it being understood and agreed that the manufacturer is selling hardboard products on its own account as well as through the agent and other agents."

Paragraph 18 permits the manufacturer "from time to time and at any reasonable time, through a firm of certified accountants, to inspect and examine the physical inventory and books and records of the agent relating to any transactions or matters" which are the subject of the agreement.

Paragraph 23 provides that the agreement shall continue during the life of the patent having the longest term to run.

The Celotex 1933 agreement was accompanied by a separate supplemental agreement, also dated October 10, 1933, containing the terms of settlement of the patent litigation involving Patent No. 1,663,505, and providing that if Masonite should make any agency agreement with respect to the sale of hardboard products on terms more favorable to the agent than contained in the Celotex agreement, then Celotex would be entitled to the benefit of such terms.

I can find nothing in this 1933 agreement to suggest that it was other than an agreement of true agency; the language is purely that of agency, and it was the unchallenged testimony of all of the witnesses that only an agency relationship was intended. Un-

der the agreement, the agent was appointed "as a del credere factor" to sell hardboard products for the Masonite Corporation; the compensation of the agent was a commission on the sales actually made by the agent. The agent was permitted to carry hardboard products in stock, but it was expressly provided that such stock products should be received and held by the agent on consignment, and that the title thereto should remain in the Masonite Corporation until sold by the agent. These consignment provisions were supplemented by others requiring the agent to make monthly reports to the Masonite Corporation showing the amount of inventory unsold, and permitting the Masonite Corporation from time to time to examine through public accountants the physical inventory, books and records of the agent relating to transactions under the agreement. The provisions regarding payment to the Masonite Corporation by the agent on account of sales made by the agent are the usual provisions of del credere factoring agreements, and are in no way inconsistent with the agency relationship. It is clear, also, that the practice under the agreement squared entirely with its terms; there were no secret or outside understandings between the Masonite Corporation and the different agents, and all parties to the agreement were scrupulous to live up to its various provisions.

1022 The Government insists that the agreement was a disguised sales agreement, and points to a number of provisions in support of the contention. It is first said that under the agreement the agent "assumed the incidents and burdens of ownership," the principal references being to the provisions requiring the agent to pay (1) "freight or transportation costs," (2) "sales or similar taxes," and (3) for insurance on consigned products. The answer is that the agent as bailee was free to enlarge its legal responsibility by contract without affecting the agency relationship. Sturm v. Boker, 150 U. S. 312; In re Columbus Buggy Co., 143 Fed. 859. The same point was raised in United States v. General Electric Company (supra), where it was said at page 484 of the opinion, "The expense of this is of course covered in the amount of his (i. e., the agent's) fixed commission."

The other references relied on by the Government on this branch of the case are to the advance payments required of the agent, and the method of handling the sales of "longs" and "shorts." The 1933 agreement provided for an advance by the agent within 20 days after the close of the calendar month in which the order was shipped by the Masonite Corporation. This provision was, however, changed in the 1936 agreement so as to make the requirement for an advance optional with the

Masonite Corporation, and it has been stipulated that this option was never exercised as to any of the agents. It is doubtful, therefore, whether the point has any application, but irrespective of whether it has or not, I am satisfied that an advance by a del credere factor is entirely consistent with an agency relationship. United States v. General Electric Co. (supra, p. 484); cf. General Electric Co. v. Brower, 221 Fed. 597; cf. Commercial National Bank v. Heilbronner, 108 N. Y. 439.

The contention of the Government with respect to the provision for handling the sales of "longs" and "shorts" is that if the agent's customer ordered hardboard shorter than standard length, the agent would be required to pay the Masonite Corporation for the entire standard-sized boards. Whether this is the effect of the language of the 1933 agreement is not clear; but in any event it would seem to be a reasonable provision that if the agent specified in its order a smaller size than the standard size mentioned in the agreement, the Masonite Corporation should not be asked to assume the burden of disposing of the remnant. The provision for cutting the standard-sized boards was for the convenience of the agent, and there was a clear right to deal specially with an incidental byproduct resulting from the fact that the agent desired to deliver to a customer a board shorter than standard.

The Government next asserts that the Masonite Corporation did not attempt to control the conduct of the agents in such a way as to make them true agents. The criticism in this respect is directed largely to the fact that the agents were permitted to sell hardboard under their own trade-marks and trade names, and that the consigned hardboard was stored by the agents in their own warehouses along with their own products without the posting of signs to indicate that the hardboard belonged to the Masonite Corporation. It is, however, well settled that a factor selling goods on consignment is not required "to advertise the fact of his agency to his customers." Taylor v. Fram, 252 Fed. 465, 469; In re Klein, 3 F. (2d) 375, 379. Neither is it necessary that the goods be segregated and marked in order to preserve the agency relation; General Electric Co. v. Brower, 221 Fed. 597; McCallum v. Bray-Robinson Clothing Co., 24 F. (2d) 35; nor that the proceeds from sales be held separately by the factor. In re Warner-Quinlan Co., 86 F. (2d) 103.

The contention of the Government that the hardboard was not subject to recall by the Masonite Corporation during the life of the agreement is untenable. There was, it is true, no express provision to that effect, but it was necessarily implied from the fact that the hardboard was held on consignment, and that title thereto remained in the Masonite Corporation until sold by the

agent. The whole tenor of the agreement negatives any intention to make sales to the agent.

1023 This is particularly emphasized by the language of paragraph 15 which provides that on the termination of the agreement, the agent shall "purchase and pay for all products consigned to it and unsold, or at the option of the manufacturer shall return all or so much thereof as it may request." The solitary use of the word "purchase" in this connection is a recognition that no "purchase" was intended during the time that the agency continued; when it came to an end the parties were in a position to deal with each other as they saw fit. In re Renfro-Wadenstein, 53 F. (2d) 834.

I think the 1933 agreement is in all material respects substantially the same as the agreements with the A and B agents in United States v. General Electric Company (supra). There are no doubt some distinguishing characteristics, but these in no way impair the effect of the decision as a controlling authority in the determination of the present case. With respect to the regulation of prices, there is no contention by the Government that the Masonite Corporation does more than determine the price at which its own agents may sell its own hardboard products; it is not even suggested that there is or has been any attempt by the Masonite Corporation, or by any of the agents, to influence or control the price after title has once passed. This was exactly the situation in the General Electric case, which occasioned the following comment from Chief Justice Taft at page 484 of the opinion:

"The agent has no power to deal with the lamps in any way inconsistent with the ownership of the lamps retained by the company. When they are delivered by him to the purchasers, the title passes directly from the company to those purchasers. There is no evidence that any purchaser from the company, or any of its agents, is put under any obligation to sell at any price or to deal with the lamps purchased except as an independent owner."

The question of monopoly raised by the Government is fully answered by the General Electric decision and requires little consideration. The validity of the Mason patent No. 1,663,505, was sustained by the Circuit Court of Appeals in the Third Circuit on July 6, 1933, and the evidence shows that a number of the defendants have been active since then in trying to find a substitute for the patented hardboard which would not infringe. That they have during all this period been unable to make any progress in this direction, is at least a tribute to the merit of the invention. Whatever monopoly the Masonite Corporation has in the production and sale of hardboard is derived from the ownership of this Mason patent, and I find nothing in the evidence

to show that it has in any respect misused any of its patent rights or violated any of the provisions of the Sherman or Clayton antitrust laws.

There may be a decree in favor of the defendants dismissing the complaint.

August 6, 1941.

ALFRED C. COXE,
U. S. D. J.

1024 In District Court of the United States for the Southern District of New York

[Title omitted.]

Plaintiff's objections to the findings of fact and conclusions of law, as modified, proposed by the defendants for adoption by the court; and proposed supplemental findings of fact

Filed Sept. 27, 1941

Comes now the United States, the plaintiff herein, and makes the following objections to the Findings of Fact and Conclusions of Law proposed by the defendants, and proposes the adoption by the Court, in substitution therefor or in addition thereto, of the Supplemental Findings of Fact set forth herein.

OBJECTIONS TO THE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The plaintiff objects to the form and substance of the Finding of Fact No. 2.

The plaintiff objects to that part of the Finding which states that Patent No. 1,663,505 is a "basic" patent. Whether a patent is "basic" is a conclusion of law which should only be adopted after a careful consideration of the scope of the claims of the patent considered in relation to the claims of all other patents which relate to the same subject matter. The record in this case provides
1025 no foundation for the consideration of that question. The decision of the Circuit Court of Appeals for the Third Circuit in upholding the patent speaks for itself and need not be characterized in the Findings of Fact. So far as the record here bears this conclusion, it creates substantial doubt whether Patent No. 1,663,505 can be regarded as "basic" in any true sense. A more accurate statement of the evidence so far as it relates to this part of the Finding is found in plaintiff's proposed Supplemental Finding of Fact No. 10 (pp. 20–21, infra).

The plaintiff objects also to the form and substance of that part of the Finding which reads "insulation board * * * is * * * not directly involved in the present litigation" as being

contrary to the facts set forth in the record. This statement is objectionable because it is not a true finding of fact but a conclusion as to the issues raised by the contentions of the parties. The plaintiff has consistently contended that the defendants have used the contracts with respect to hardboard as a means of controlling competition in the sale of insulation board and roofing. Even if the Court concludes that this contention is unfounded, it can hardly find as a fact that insulation board is not directly involved in the litigation. In support of its contention that insulation board is directly involved in this case, the plaintiff points to evidence in the record which establishes the following facts:

(1) Insulation and hardboard are related products and are usually purchased and sold by the same dealers (R. 101, 111, 144, 236, 259–260, 426, 455; Ex. SS–3).

(2) All of the defendants are large manufacturers or distributors of insulation board (Stip., pages 3, 4, 5, 6, 7, 8; Df. Ex. A).

(3) Insulation and hardboard are sold under combined bids (R. 151, 239–240, 406; Ex. S–44, sec. 14; Pl. Ex. 7, 8; Df. Ex. A).

1026 (4) Insulation and hardboard are shipped in mixed cars (R. 101, 111, 144, 236, 259–260, 426; Ex. SS–3).

(5) Masonite sent out notices and warnings concerning the prices of insulation board and hardboard in combined bids (Pl. Ex. 7, 8, R. 108–109); and

(6) Section 14 of the 1936 contracts (Ex. S–44) and Section 14 of the 1937 contracts (Ex. S–46, S–47) refer specifically to the sale price of insulation board. Section 4 of the 1941 agreement provides for sales of hardboard and insulation board when sold on combined bids (Ex. S–51, sec. 4).

(7) It was the policy of the Masonite Corporation to enter into contractual relations for the sale and distribution of hardboard only with those concerns which manufactured and sold or distributed insulation board products. In furtherance of this policy, Masonite refused to enter into an agreement similar to the agreements existing between Masonite and certain of the other defendants with the Flintkote Company until Flintkote began to manufacture or distribute insulation board (Pl. Ex. 14, 33; R. 435–436).

2. The plaintiff does not object to the form or substance of the first two sentences in the Finding of Fact No. 5. However, in the interests of accuracy and completeness the following sentence should be inserted after the second sentence of the Finding:

"Sales to these industries, other than the building trades, are known as sales to 'industrial purchasers.' By the contractual agreements between the defendants in effect at various times from

October 10, 1933 through April 1, 1941 the defendants agreed to allow Masonite only to sell 'longs' or 'standard size' hardboard products to 'industrial purchasers.'"

1027 The plaintiff objects to the form and substance of the last sentence of the Finding of Fact No. 5 upon the ground that it is irrelevant. The statement is objectionable also upon the ground that it is incomplete and misleading. If a Finding of this nature is to be made, it should be changed and modified by the addition of the following statement: "as reported in the Preliminary Summary of the 1939 Census of Retail Trade" (Stip. par. 19).

3. The plaintiff does not object to the form or substance of the Finding of Fact No. 6. However, in the interest of accuracy and completeness, it submits that the Court should find as a Fact the additional statement of fact contained in the plaintiff's proposed Supplemental Finding of Fact No. 8 (p. 19).

4. The plaintiff does not object to the first two sentences of the Finding of Fact No. 7.

It objects to both the form and substance of the third and fourth sentences upon the ground that the statements contained therein are irrelevant and not supported by the evidence.

The plaintiff objects to the form and substance of the last sentence upon the ground that it is misleading and incomplete. In paragraph 8 of its proposed Supplemental Finding of Fact, the plaintiff has proposed an alternative Finding of Fact dealing with the same subject matter which the plaintiff submits is a more complete and accurate statement of the subject matter in the last sentence of the Finding of Fact No. 7 (see p. 19, infra).

5. The plaintiff objects to both the form and substance of the second sentence of the Finding of Fact No. 8 upon the ground that the statement contained therein is irrelevant and is not supported by the evidence.

6. The plaintiff objects to the form and substance of the last sentence of the Finding of Fact No. 10 upon the grounds stated in its objection to Finding of Fact No. 2 (see pp. 1-2, supra).

1028 7. The plaintiff objects to the form and substance of the first sentence of the Finding of Fact No. 11 upon the ground that it is irrelevant. The plaintiff objects to the second sentence upon the ground that it is inaccurate, misleading, and incomplete. If this Finding is to be made, in the interest of accuracy it should be modified as follows: The statement, "It was also felt that there was little chance that the decision would be reviewed by the Supreme Court because the decision rested largely upon factual findings and there was an absence of conflicting rulings in different circuits," should be followed by the statement, "but Masonite did

believe that if the Supreme Court should hear the case that there was a very good chance that the patent would be invalidated" (R. 91).

8. The plaintiff objects to the form and substance of the Finding of Fact No. 12. The statements in the Finding are irrelevant under the decision of the Supreme Court in United States v. Socony-Vacuum Co., 310 U. S. 150, 212–213, 218, 220–224. If the Finding is to be made, in the interest of accuracy the last sentence in the Finding should be modified by the addition of plaintiff's proposed Supplemental Finding of Fact No. 1 (see pp. 16–17, infra). The statement in the last sentence of the Finding that the agreement "constituted the receivers of the Celotex Company an agent of Masonite to sell Masonite hardboard products" is not a proper finding of fact but a conclusion of law and, as such, is not supported by the evidence.

9. The plaintiff objects to the form and substance of the Finding of Fact No. 14. To conform to the evidence, the Finding should be modified in accordance with plaintiff's proposed Supplemental Finding of Fact No. 2 (see p. 17, infra).

The last sentence in the Finding of Fact No. 14 is objectionable on the further ground that it is contrary to the evidence (Stip. par. 29; R. 76, 79, 80).

1029 10. If the first sentence of Finding of Fact No. 15 is to be included as a Finding, it should be amplified by plaintiff's proposed Supplemental Findings of Fact Nos. 4 and 5 (see pp. 17–18, infra). The plaintiff objects to the form and substance of the last sentence of Finding of Fact No. 15 upon the ground that it is contrary to the evidence and upon the ground that it is not a proper finding of fact but a conclusion of law. In so far as this sentence purports to contain statements of fact, a correct statement of the relevant facts is found in plaintiff's proposed Supplemental Findings of Fact Nos. 4 and 5 (pp. 17–18, infra).

11. The plaintiff objects to the form and substance of Finding of Fact No. 16 upon the ground that it is not supported by the evidence.

12. The plaintiff objects to the form and substance of that part of the first sentence of the Finding of Fact No. 17 which reads:

"Separate agreements similar to the agreement referred to in finding 12 and certain supplemental agreements were executed severally between Masonite and the companies named in the following table * * *"

upon the ground that it is inaccurate, misleading, and incomplete. In plaintiff's proposed Supplemental Findings of Fact Nos. 4 and 5, a more accurate and complete statement of the facts relat-

ing to the execution of the agreements referred to in this Finding is set forth (pp. 17–18, infra).

The plaintiff objects to the form and substance of the second sentence of the Finding of Fact No. 17 upon the ground that the statement contained therein is misleading, incomplete, and inaccurate. In plaintiff's proposed Supplemental Finding of Fact No. 5 (see p. 18, infra), plaintiff has set forth a more accurate and complete statement of the facts.

The plaintiff objects to the form and substance of the third sentence of the Finding of Fact No. 17 upon the ground that it is irrelevant. United States v. Socony-Vacuum Oil Corp., 310 U. S. 150, 212–213, 218, 220–224.

1030 The plaintiff objects to that part of the fourth sentence of the Finding of Fact No. 17, in which it is stated that the "remaining defendants (other than Masonite) later severally executed agreements with Masonite," upon the ground that it is misleading, incomplete, and inaccurate, and is not supported by the evidence.

13. The plaintiff objects to the third sentence of the Finding of Fact No. 19 upon the ground that it is inaccurate, incomplete, and misleading, and upon the additional ground that the statement contained therein is not supported by the evidence.

The plaintiff objects to the form and substance of the last sentence of the Finding of Fact No. 19 upon the ground that it is not supported by the evidence.

14. The plaintiff objects to the form and substance of the Finding of Fact No. 20 upon the ground that it is misleading and inaccurate. In paragraphs 4 and 5 of the plaintiff's proposed Supplemental Finding of Fact, the plaintiff has set forth a proposed alternative Finding dealing with the same subject matter which, it submits, is more complete and accurate (see pp. 17–18, infra).

15. The plaintiff objects to the form and substance of the Finding of Fact No. 21 upon the ground that it is incomplete and misleading. It is apparent from the contracts themselves that the parties contemplated that further agreements would be made, for the contracts specifically provided that, if a subsequent contract contained more favorable terms, the same terms would be accorded to the contracting parties (Ex. S–24, S–32, S–34, S–37, S–39, S–41).

The plaintiff submits that a more accurate statement of the subject matter of the Finding of Fact is found in plaintiff's proposed Supplemental Findings of Fact Nos. 4 and 5 (see pp. 17–18, infra).

16. The plaintiff objects to the form and substance of Finding of Fact No. 22 upon the ground that it is contrary to the evidence. Certain of the defendants suggested extended changes and modi-

fications in the contracts and the terms and conditions relat-
1031 ing to the fixing of prices and limitation of classes of customers and for the inclusion of terms in the contract relating to an agreement by Masonite to adhere to the prices fixed for its "agents" (Pl. Ex. 23, 25; R. 241, 287–288, 407, 408, 409).

17. The plaintiff objects to the form and substance of the Finding of Fact No. 23 upon the ground that the statement in the third, fourth, and fifth sentences that the agreements referred to were "agency" agreements is not a finding of fact but a conclusion of law and, as such, is not supported by the evidence.

18. The plaintiff objects to the form and substance of that part of the Finding of Fact No. 24 which states, "said agreements were not made pursuant to or as a result of any conspiracy or concerted action to fix prices or restrain or monopolize trade or commerce, interstate or foreign, in hardboard or any product similar thereto or competitive therewith," upon the ground that it is not a finding of fact but a conclusion of law and, as such, is not supported by the evidence.

19. The plaintiff objects to the form and substance of the Finding of Fact No. 25 upon the ground that the statement in the first three sentences that the agreements referred to were "agency" agreements is not a finding of fact but a conclusion of law and, as such, is not supported by the evidence.

The plaintiff objects to the first three sentences upon the additional ground that the statement contained therein is incomplete and misleading. The plaintiff submits that, in the interests of completeness, the following sentences should be added after the third sentence:

"The terms of the agreement between Masonite and Flintkote were similar to the terms of the agreements entered into on October 10, 1936 referred to in the Finding of Fact No. 23. The terms of the agreement between Masonite and Dant & Russell were substantially identical to the terms of the agreement between Masonite and Flintkote."

1032 The plaintiff objects to the form and substance of the last sentence of the Finding of Fact No. 25 on the ground that it is not a finding of fact but a conclusion of law and, as such, is not supported by the evidence.

20. The plaintiff objects to the form and substance of the last sentence of the Finding of Fact No. 26 upon the ground that it is a conclusion of law, not a finding of fact, and that, as such, it is not supported by the evidence.

21. The plaintiff objects to the form and substance of the Finding of Fact No. 27 because (1) the record does not support the statement that "an effort was made to remove from the agreements a number of provisions which had been criticized by the

Government." In fact, the new agreements retained the price provisions which were the principal basis of the Government's attack; and (2) the statement that the new agreement was executed "separately" by all the defendants is inaccurate and misleading. The record shows that the new agreement was prepared and agreed upon jointly in a series of conferences which all the defendants attended. Paragraph 7 of the plaintiff's proposed Supplemental Findings of Fact contains a finding with respect to the circumstances under which the 1941 agreements were made (see p. 19, infra).

The plaintiff objects to the last sentence on the additional ground that it is not a finding of fact but a conclusion of law.

22. The plaintiff objects to the form and substance of the Finding of Fact No. 28 upon the ground that it is not supported by the evidence.

1033 The plaintiff objects to the last sentence upon the additional ground that the statement contained therein is irrelevant.

23. The plaintiff objects to the form and substance of the Finding of Fact No. 29 upon the ground that it is not supported by the evidence and upon the additional ground that it is not a finding of fact but a conclusion of law.

24. The plaintiff objects to the form and substance of the Finding of Fact No. 30 upon the ground that it is irrelevant. United States v. Socony-Vacuum Oil Corp., 310 U. S. 150, 212–213, 218, 220–224.

The plaintiff objects to the form and substance of the Finding upon the additional ground that it is contrary to the evidence. The purpose and effect of the agreements were to suppress manufacture and production of hardboard by the defendants (other than Masonite) which had alternative methods and processes available to them for the production of hardboard. An accurate statement of the facts relating to this subject is found in paragraph 10 of the plaintiff's proposed Supplemental Findings of Fact (pp. 20–21, infra).

The statement that the effect of the agreements was to cause distribution of hardboard "without increase in price to the consumer" is objectionable upon the additional ground that it is inaccurate and misleading. During the period October 10, 1933 through January 1, 1941 the prices charged for hardboard products manufactured by the Masonite Corporation sold in interstate trade and commerce have increased substantially as indicated by the prices to dealers of the five most popular hardboard products when sold in carload quantities. Based upon the prices charged in the Eastern United States, specifically in the cities of Philadelphia, Pennsylvania, and New York, New York, as set forth in

the Masonite dealer price list (Ex. S–55), the price of 1/8" Tempered Presdwood has risen from $54 (4 x 5', 8', 9', and
1034 10') and $50 (4 x 6' and 4 x 12') per 1,000 sq. ft. to $59 (for all sizes), an increase of 9% and 18% (Ex. S–55); the price of 1/8" Tempertile and 5/16" Tempertile has not changed; the price of 1/8" Presdwood has risen from $44 (4 x 5', 8', 9', and 10'), $40 (4 x 6', 4 x 12') per 1,000 sq. ft. to $46 (for all sizes), an increase of 4% and 15%; the price of 1/4" Deluxe Quarterboard has risen from $44 (4 x 5', 8', 9', and 10'), $40 (4 x 6' and 4 x 14') per 1,000 sq. ft. to $46 (for all sizes), a rise of 4% and 15%; the price for 1/4" Quarterboard has risen from $32 (4 x 5', 8', 9', and 10'), $30 (4 x 6' and 4 x 12') per 1,000 sq. ft. to $35 (for all sizes), an increase of 9% and 16⅔%.

25. The plaintiff objects to the Finding of Fact No. 31 upon the ground that it is not supported by the evidence.

26. The plaintiff objects to the substance of the Finding of Fact No. 32 as being contrary to the evidence. A more complete and accurate statement of the subject matter of that part of the Finding which reads "which price is the price at which Masonite itself sells" is found in paragraph 9 of the plaintiff's proposed Supplemental Finding of Fact (pp. 19–20, infra). The plaintiff also objects to the last part of this proposed Finding on the additional ground that it is not a finding of fact but a conclusion of law, and, as such, is not supported by the evidence.

27. The plaintiff objects to the form and substance of Finding of Fact No. 33. The first sentence of the Finding is unobjectionable so far as it goes, but it is not a complete statement of the relevant facts. In paragraph 8 of its Finding the plaintiff has submitted a more accurate and complete statement of the subject-matter of this sentence (p. 19, infra).

1035 The plaintiff objects to the substance of the second and third sentence of the Finding on the ground that they are not supported by the evidence. The second sentence is objectionable also upon the ground that it is irrelevant. In addition, the statement in the third sentence, "the said agreements were never used for ulterior purposes," is objectionable in form in the sense that it is not supported by any statement in the court's opinion.

In Paragraph 12 of its proposed Supplemental Finding of Fact the plaintiff has set forth an accurate and complete statement of the subject matter of the last sentence of this Finding (infra, pp. 21–22).

28. The plaintiff objects to the form and substance of the Finding of Fact No. 34. There is nothing in the Court's opinion to support the form of this Finding. The alleged facts stated in the Finding are irrelevant under the decision in United States

v. Socony-Vacuum Oil Company, 310 U. S. 150, 212–3, 218, 220–224. The statement in the Finding that the price of hardboard has not increased since October 10, 1933, is plainly inaccurate. (Ex. S–55.) The objections set forth to Finding of Fact No. 30 (supra, pp. 10–11) apply to this Finding of Fact.

29. The plaintiff objects to the form and substance of Finding of Fact No. 35. The second sentence in the Finding, "When these standard sizes are cut by Masonite Corporation at the request of other defendants in pieces of 5 feet or less in length, such pieces are called 'shorts' and are not generally adaptable for use in the building trades," does not conform to the evidence. The 1933 agreement, paragraph 9; the 1937 agreement, paragraph 9; the 1941 agreement, Schedule A; and the price lists issued by Masonite Corporation (Ex. S–55), all indicate that "shorts" were and are offered for sale to the building trades and were and are sold to the building trades by all of the defendants, including Masonite.

1036 The fourth sentence in the Finding of Fact is not supported by the evidence. There is no evidence to indicate that "shorts" were and are "incidental byproducts." On the contrary, the fact that the agreements contemplated the sale of hardboard in sizes less than 12 feet long indicates clearly that the production of "shorts" was contemplated and intended.

The specific objections made to the fourth sentence above apply to the fifth sentence. In addition, there is no evidence to substantiate the statement contained in the fifth sentence that "such provision constituted a reasonable method of dealing with such incidental byproduct, and were entitled into without any intent or purpose to restrain or monopolize interstate trade or commerce." It was the intention of the defendants, as is clearly shown in the contracts, that a concern ordering a "long" should make complete payment for the resulting "short." (Ex. S–23; sec. 10; S–44, sec. 9; S–46; S–47, sec. 9.) If the sale of the "short" were made to an industrial purchaser, that concern, having paid for the "short," was free to sell at any price it chose but it agreed to adhere to the fixed price in all sales to building trades (Ex. S–23, sec. 10; S–44, sec. 9; S–46; S–47, sec. 9). The provisions relating to "shorts" are a part of the entire contractual relationship between Masonite and the other defendants and the reasonableness or unreasonableness of those provisions cannot be determined separately from the remainder of the contract (Heryford v. Davis, 102 U. S. 235, 243–244.) The plaintiff objects to the statement upon the additional ground that it is not a finding of fact but a conclusion of law and, as such, is not supported by the evidence.

There is no evidence to support the statement made in the sixth sentence, "It was necessary for Masonite to dispose of them at prices much lower than the standard length prices and in whatever trade channels it could find to absorb them." Both in the price lists and in the contracts, as set forth above, "shorts"
1037 were offered for sale and sold to the building trades.

There is no evidence to indicate that "shorts" must be sold at "lower" prices or "in whatever trade channels" could be found. By the letter agreement dated August 26, 1940, and the 1941 agreements, "shorts" are still offered for sale to the building trades as a part of the entire contractual relationship and there is no evidence to show any necessity to sell at "lower" prices or in any trade channels other than the building trades.

30. The plaintiff objects to the form and substance of the Finding of Fact No. 36 on the ground that it is incomplete, misleading and inaccurate. Paragraph 11 of the plaintiff's proposed Supplemental Findings contains an accurate statement of the relevant facts with respect to "seconds" or "off-grade" boards (p. 21, infra).

The plaintiff objects to the finding upon the additional ground that the provisions of the contracts relating to "industrial purchasers" and by which the defendants agreed to reserve to Masonite the exclusive right to sell to "industrial purchasers" are a part of the entire contractual relationship between Masonite and the other defendants and the reasonableness or unreasonableness of those provisions cannot be determined separately from the remainder of the contracts. Heryford v. Davis, 102 U. S. 235, 243–244.)

31. The plaintiff objects to the form of the Finding of Fact No. 37. The statement of facts is not complete. Nothing in the court's opinion supports the form of the proposed finding. The plaintiff submits, however, that a finding dealing with the subject matter of the second sentence is appropriate and in paragraph 13 of its proposed Supplemental Findings of Fact has included a finding which is a complete and accurate statement of the facts on this point (p. 22, infra).

32. The plaintiff objects to the Finding of Fact No. 38 in form and substance on the ground that the subject matter of the first sentence is irrelevant and immaterial, and that the second
1038 sentence is inaccurate and unnecessary because the contracts will speak for themselves.

33. The plaintiff objects to the form and substance of the Finding of Fact No. 39 upon the grounds set forth above in objecting to Finding of Fact No. 2 (pp. 1–2, supra). The plaintiff objects to the Finding upon the additional ground that it is misleading, incomplete and inaccurate and not supported by the evidence. A more complete and accurate statement of the subject matter in the second, third, and fourth sentences of this Finding is set forth in

paragraph 10 of the plaintiff's proposed Supplemental Findings of Fact (pp. 20–21, infra).

34. The plaintiff objects to the Finding of Fact No. 40 on the ground that it is not a finding of fact but a conclusion of law and that, as such, it is not supported by the evidence.

In addition, the plaintiff objects to that part of the Finding which reads, "Masonite's patents on hardboard are fundamental and basic", upon the grounds set forth in objecting to Finding of Fact No. 2 (pp. 1–2, supra).

35. The plaintiff objects to the Finding of Fact No. 41 on the ground that it is not a finding of fact but a conclusion of law, and that, as such, it is not supported by the evidence.

36. The plaintiff objects to the form and substance of the Finding of Fact No. 42. The statements in the Finding are irrelevant and immaterial under the decision in United States v. Socony-Vacuum Oil Company, 310 U. S. 150, 212–213, 218, 220–224. There is no evidence to support the statements in the Finding.

37. The plaintiff objects to the Finding of Fact No. 43 on the ground that it is not a finding of fact but a conclusion of law, and that, as such, it is not supported by the evidence.

38. The plaintiff objects to the form and substance of Finding of Fact No. 44 on the ground that the proposed Finding is not a proper finding of fact but a conclusion of law, and on the additional ground that the Finding is not supported by the evidence.

1039 39. Plaintiff does not object to the Finding of Fact No. 46 except on the ground that it is an incomplete statement of the facts. The plaintiff submits that in paragraph 15 of plaintiff's proposed Supplemental Findings of Fact a more complete statement of the facts has been set forth (infra, pp. 23–4).

40. The plaintiff objects to the Conclusions of Law numbered 1 to 10 inclusive.

PLAINTIFF'S REQUEST FOR SUPPLEMENTAL FINDINGS OF FACT

The Government requests the Court to find each of the following facts as a part of the Findings of Fact. Each suggested finding of fact is numbered separately and following each proposed finding is a reference to the part of the record which supports it. The plaintiff submits that each of the proposed Supplemental Findings of Fact is consistent with the facts stated in the opinion of the Court.

1. In connection with the negotiations between Masonite and Celotex looking to the settlement of patent litigation, Masonite had determined that as a matter of policy it would not enter into any contractual relations with any other concern for the purpose of

selling hardboard unless Masonite retained the power to fix and control the price and to determine the class of customers to which that concern would sell. (R. 396–397, 136–137, 141, 233, 249, 423.) Numerous meetings were held between Masonite and Celotex both during the pendency of the infringement suit and after the circuit court's opinion for the purpose of discussing the execution of a cross-license agreement or some other contractual arrangement between the parties with respect to hardboard. (Stip. par. 24; R. 73–74, 77, 79, 80–82, 89, 223–224. At one of these meetings which was held on October 31, 1932 immediately following the district court's opinion in the infringement suit, Ben Alexander and James P. Gillies conferred with Mr. Dahlberg, Mr. Hampson, Celotex's attorney, and Mr. Munroe, a Celotex Vice-President, concerning the effect of the opinion and the kind of an arrangement which might be worked out between these two companies.

Mr. Dahlberg, on behalf of Celotex, was "perfectly willing
1040 to do anything which was constructive in setting up some kind of an establishment which could license and control the price situation." (R. 77, 80–92, 224.)

2. The agreement between Masonite and Celotex was dated October 10, 1933. It was executed by James P. Gillies, Executive Vice-President of Masonite, on behalf of the Masonite Corporation, and Hobart P. Young, Receiver, on behalf of The Celotex Company, acting pursuant to the order of the district court authorizing Celotex to enter into a "certain sales agreement" (copy of which was attached to the order). (Ex. S–19, S–20.) At the conclusion of the reorganization proceedings relating to The Celotex Company in 1935, The Celotex Corporation, one of the present defendants, assumed the agreement referred to above pursuant to the order of the district court. (R. 359, 360; Ex. S–25.)

3. During the course of the negotiations between Masonite and Celotex which culminated in the agreement of October 10, 1933, Celotex was under the impression that Masonite did not contemplate entering into similar agreements with other companies. (R. 233.) However, Masonite informed Celotex as soon as similar agreements were made with other companies and sent Celotex a copy of the contracts. (R. 302.)

4. Prior to October 10, 1933, certain of the defendants which entered into contractual relationships with Masonite had been in communication with Masonite looking toward an arrangement whereby these defendants could manufacture or distribute hardboard. On August 29, 1933, Masonite sent a copy of a proposed agreement to Johns-Manville Sales Corporation (R. 104, 271; Pl.

Ex. 24) and National Gypsum Co. (R. 104, 321) together with a letter stating that Masonite was offering a proposed contract to these two companies and contemplated entering into similar agreements with other concerns. These contracts contained essentially the same provisions as the contracts subsequently entered into between Masonite and Johns-Manville Sales Corporation
1041 and National Gypsum Co. (R. 271, 321.) At about the same time draft agreements were also sent to the Armstrong-Newport Company (predecessor to Armstrong Cork Company) (R. 104), Hawaiian Cane Co. (R. 104) and Insulite Company (R. 307).

5. Prior to the time when each of the defendant companies listed in Finding of Fact No. 17 entered into its respective contract with Masonite set forth in Finding of Fact No. 17 each knew of the existence and the terms of the substantially identical contracts which Masonite had previously entered into with other concerns for the distribution of hardboard. (Johns-Manville, R. 103, 104, 271; Armstrong, R. 103, 104, 366; Insulite, R. 103, 104, 312; Wood Conversion, R. 103, 104, 317; National Gypsum, R. 392.)

6. After Celotex ceased the production of hard panel board in 1933 the only companies other than Masonite which manufactured a product having characteristics similar to Masonite's hardboard products were Insulite and United States Gypsum (Stip. par. 64, par. 35). The amount manufactured by United States Gypsum from 1934 to 1939 was less than 3% of the amount Masonite produced (Stip. par. 63). About September 1, 1933, Insulite received a copy of a form of contract which Masonite later executed with Celotex (R. 307). It was the desire of Masonite to induce Insulite to cease the manufacture of hardboard for domestic sales and to accept a contract substantially identical to that between Masonite and the other defandants listed in Findings of Fact Nos. 12 and 17. (Pl. Ex. 2.) During the period 1933–1934 James P. Gillies, on behalf of Masonite, visited the Insulite offices in Minneapolis, Minnesota, and discussed with that company the possibility of entering into some kind of a contractual arrangement with it. (R. 83–85.) In the words of Mr. Gillies, then Executive Vice-President and General Manager of Masonite, "We wanted some means of making the proposition to them as attractive as to any other Agent in the hope of getting everybody in the same bed and under the same blanket." (Pl. Ex. 2.) The result of the agreement between Insulite and Ma-

sonite, dated February 2, 1935, was that Insulite ceased to manufacture hardboard for sale in the United States. (R. 129.)

1042 7. During the pendency of the present litigation conferences and meetings between the officers and agents and attorneys representing each of the defendants were held in New York and Chicago looking to the modification of the existing contracts which the Government had attacked on the ground that the contracts unlawfully restrained interstate trade and commerce in violation of the Antitrust laws. (R. 59, 146–147, 243, 269–270, 323, 328, 385–386, 431–433). These conferences resulted in the agreement dated March 20, 1941, but which actually became effective April 1, 1941. (R. 146.) Each of the defendants knew prior to the date of the execution of that agreement that an agreement substantially identical with that which it proposed to make with Masonite was to be made between Masonite and each of the other defendants. (R. 59, 146–147, 243, 269–270, 302, 318, 322, 323, 327, 328, 385–386, 431–433.)

8. The defendant companies are all large corporations engaged in the manufacture and sale or distribution of various building materials including fiber structural insulation board and hardboard. Collectively, the defendant companies dominate both the hardboard and the insulation board industry. (R 220, 455; SS–16, SS–17, SS–18, SS–19; Ex. S–2, S–3, S–4, S–5, S–6, S–7, S–8, S–9, S–10; Stip. Par. 7, 8, 9, 10, 11, 12, 13, 14, 15, 16.)

9. At the respective times of the agreements between Masonite and the other defendants it was the understanding of Masonite and the other defendants which had agreements with Masonite that the said agreements required Masonite itself to sell to its own dealers and wholesalers in accordance with the prices fixed and the terms and conditions of sale fixed for the other defendants and set forth in the dealers' price lists and wholesalers' compensation schedules, respectively, as the same were published by it from time to time. And as to the agreement of 1941, whether it does or does not expressly require that Masonite shall

1043 itself sell in accordance with the published prices, it is determined policy and intention of Masonite and it is the understanding between the defendants that Masonite would at all times adhere to the prices set forth in its catalogues and price lists. (R. 30, 95, 148–149, 175, 241, 287–288, 303, 313, 320, 326, 352, 368, 383, 407–409; S–23, S–30, S–31, S–33, S–35, S–38, S–40, (Sec. 5); Stip. Par. 42, S–44, (Sec. 5); S–46, S–47, (Sec. 5); S–51, (Sec. 4); Pl. Ex. 25.)

10. Celotex now owns 8 patents which relate in some way to the production of hardboard. (Pl. Ex. 26, R. 292, 471). Since October 10, 1933, the research staff of the Celotex Company has discovered and devised at least one process for manufacturing hardboard which in the opinion of legal counsel for Celotex did not infringe the Masonite patent. However, for business and financial considerations only, Celotex did not undertake the production of hardboard by that process (R. 254, 344, 346). Since 1936 the Flintkote Company has investigated certain new processes for the production of hardboard but for financial and business reasons only the Flintkote Company did not undertake the production of hardboard by any of these processes available to it (R. 466–468). Armstrong Cork Company, the owner of U. S. patent No. 1,809,316 relating to the production of hardboard, did not undertake production of hardboard under that patented process because of business and financial considerations (R. 369–370). The Insulite Company owns fourteen American patents relating to the manufacture of hardboard (Ex. II, R. 316). In 1938 after interference proceedings between Masonite and the Insulite Company Masonite conceded priority to patent claims made
1044 by the Insulite Company (Stip. par. 46; Ex. 48). It was part of the agreement between Masonite and Insulite that Insulite agreed to license Masonite exclusively under its patents and patent applications for the manufacture of hardboard. By the terms of the agreement the license was exclusive of Insulite itself and could be terminated by Insulite on thirty days' notice only in the event that the agreement between the Insulite Company and Masonite Company was no longer in effect. (Ex. S–48.)

11. During the period October 10, 1933 through 1940, the total amount of hardboard products produced by Masonite which is "seconds" or off-grade material has varied from approximately 12 per cent to 5 per cent (Ex. SS–7). Large quantities of first-grade hardboard products of all sizes are sold to industrial users by Masonite (R. 137–139, 180, 429; Ex. S–56, SS–7) and the amount of hardboard products sold to industrial purchasers has steadily increased since 1933 (Ex. S–56, SS–4). It was a part of the contractual agreement between the defendants that Masonite only should be permitted to sell hardboard products to industrial purchasers, although Masonite recognized that certain of the other defendants were and are fully equipped and capable of handling sales to industrial users. (R. 429–430.) Under the terms of the 1933, 1936, and 1937 contracts, the defendants (other than Masonite) were permitted to and did sell "shorts" to any purchaser

including industrial purchasers (Ex. S–23, Ex. S–30, Ex. S–31, Ex. S–33, Ex. S–38, Ex. S–40 (sec. 10), Ex. S–44, Ex. S–46, Ex. S–47 (sec. 9), R. 371).

12. Masonite Corporation has sought to and has controlled the price of insulation board and roofing when such materials are sold in combination with hardboard. In 1934 Masonite sent a notice to all "agents" (Pl. Ex. 6) which stated that it regarded the practice of reducing the price of roofing when sold in the same carload with hardboard as a violation of the contracts then in existence between Masonite and the other defendants. By threatening to can-
1045 cel the agreement, Masonite caused one of the "agents" to raise its price two dollars on insulation board (Pl. Ex. 7). A "Notice and Warning" (Pd. Ex. 8) to the effect that Masonite would cancel the then existing contracts between it and any concern which reduced the price of insulation board when such board was sold in combination with hardboard was sent on February 6, 1935 by Masonite to Celotex and to the other "agents" (Pl. Ex. 8, R. 107–109). Furthermore, one of the important reasons for the execution of the 1936 agreements was the desire of the defendants expressly to prohibit any form of price competition arising from the practice of selling insulation board at reduced prices when sold in combination with hardboard (R. 150–151, 239–241; Stip. par. 42; Ex. S–44, sec. 14, See Ex. S–46, S–47 (Sec. 14)).

13. Each of the defendants sells and distributes large quantities of building materials of all types, including hardboard (Exhibits S–2 to 10, Stip. pars. 6–16, 40). By the terms of the contract, all of the defendants, including Masonite (R. 303), have agreed to sell hardboard at the same price and on the same terms and conditions (R. 175). Consequently, the only competition between the defendants arises from the fact that each solicits the same customers for hardboard products and sells in the same market (R. 113–114, 175, 175, 177, 263).

14. Insulite and U. S. Gypsum are the only manufacturers in the United States (other than Masonite) which produce a product having characteristics similar to Masonite's hardboard product. Hardboard produced by Insulite is sold in the export market. Only Masonite Corporation and U. S. Gypsum Corporation manufacture hardboard products for sale in the United States. During 1934 Masonite and U. S. Gypsum were parties to an interference proceedings in the United States Patent Office. In 1937 the proceedings were terminated in favor of Masonite by the Board of Appeals of the Patent Office. Subsequently, the U. S. Gypsum

Company instituted proceedings in the U. S. District Court for Delaware to review the question of priority but the action
1046 was dismissed by U. S. Gypsum on June 15, 1939. Between 1934 and 1940 U. S. Gypsum has purchased hardboard from Masonite under a sales contract and has resold the hardboard and the hardboard of its own manufacture, called "hard panel board," in interstate commerce to dealers and other purchasers. In 1941 Masonite Corporation filed a complaint in the U. S. District Court for the Northern District of Illinois charging that the U. S. Gypsum Company had infringed four patents owned by Masonite. The patent infringement action is pending and has not yet been tried. (Stip. par. 60, 61, 63, 64, Ex. S–62.)

15. Hardboard products manufactured by Masonite and insulation board manufactured or distributed by the defendants are shipped from the factories in the States where they are manufactured into other States and territories of the United States in interstate trade and commerce. Hardboard products manufactured by Masonite in the State of Mississippi are shipped in interstate commerce into other States of the United States where they are received by the defendants. Hardboard products are shipped also by Masonite from its factory in Mississippi directly to customers located in other States and territories of the United States whose orders are solicited by the various defendants including Masonite. Substantial amounts of the hardboard so shipped to each of the defendants are thereafter distributed in interstate commerce and shipped from the State in which the hardboard was received by the defendants to customers located in other States. In the years 1935 to 1940, the defendants have sold and shipped in interstate commerce into the Southern District of New York in excess of five million square feet of hardboard and large and substantial quantities of insulation board. Certain of the
1047 defendants send or maintain in the Southern District of New York representatives who solicit orders within the said District for hardboard. (Stip. par. 17, R. 101, 111, 259–260, 454–455, Ex. SS–3, S–55.)

Respectfully submitted,

HUGH B. COX,
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Special Assistants to the Attorney General.
MARCUS A. HOLLABAUGH,
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Special Attorneys.

Dated September 25, 1941.

Service of the within [plaintiff's objections and proposed supplemental findings of fact] is hereby admitted on behalf of all defendants as of September 26, 1941.

SULLIVAN & CROMWELL,
Attorneys for defendant,

The Flintkote Company, and for this purpose representing the attorneys for all other defendants.

1048 In United States District Court, Southern District of New York

UNITED STATES OF AMERICA, PLAINTIFF

v.

MASONITE CORPORATION, CELOTEX CORPORATION, CERTAIN-TEED PRODUCTS CORPORATION, JOHNS-MANVILLE SALES CORPORATION, INSULITE COMPANY, FLINTKOTE COMPANY, NATIONAL GYPSUM COMANY, WOOD CONVERSION COMPANY, ARMSTRONG CORK COMPANY, AND DANT & RUSSELL, INC., DEFENDANTS

Findings of fact and conclusions of law

This action, having duly and regularly come on for trial, and the parties hereto having entered into certain comprehensive stipulations of fact which are part of the record and on which the case was largely tried, and the allegations and proofs of the parties having been heard and considered, and the Court having rendered its opinion on August 6, 1941;

Now, therefore, after conference with counsel and consideration of the proposed findings of fact and conclusions of law submitted by defendants and the objections thereto and proposed supplemental findings of fact submitted by plaintiff, and modifications having been made in the proposed findings of fact submitted by defendants, the Court hereby makes its Findings of Fact and Conclusions of Law as follows:

1049 FINDINGS OF FACT

1. The defendant Masonite Corporation (hereinafter sometimes referred to as "Masonite") is a Delaware corporation having its principal business office in Chicago, Illinois, and its manufacturing plant at Laurel, Mississippi. It was organized in 1925 under the name of Mason Fiber Company by William H. Mason and others for the purpose of engaging in the development, manufacture and distribution of hardboard.

2. The term "hardboard" is widely understood to mean the patented product manufactured by Masonite Corporation under the basic Mason patent, No. 1,663,505, issued March 20, 1928, and other patents owned by Masonite; this product is to be distinguished from structural insulation board, which is a softer and lighter board produced in different ways by various manufacturers, and not directly involved in the present litigation.

3. Hardboard is an homogeneous, hard, dense, grainless fiber board product made from wood or woody material, and containing substantially all of the original constituents of the wood or woody material. In the manufacture of hardboard by Masonite, wood chips are disintegrated into fiber by subjecting them to high pressure steam in "guns" and discharging the gun contents explosively through restricted openings. The resulting fiber is mixed with water, refined, screened and formed into a felted sheet called a "wetlap," which is freed of either part or substantially all of its moisture content and then pressed in an hydraulic press between heated platens. The resultant products, the density and hardness of which depend largely upon the amount of pressure applied during the process of manufacture, are the homogeneous, hard, dense, grainless fiber hardboard.

1050 4. Masonite began the commercial production of hardboard in 1926 under various applications for patents relating to the product itself and the machinery and processes for the production thereof, said patents being subsequently issued on the application of said William H. Mason, as the inventor, and being assigned by him to Masonite. Subsequently, improvements in products, processes, and apparatus were developed and additional and improvements patents were issued to cover the same.

5. Hardboard is extensively used in the building industry as wallboard, for decorative paneling, for exterior coverings, as interior tile for waterproof paneling in kitchens and bathrooms, for flooring and subflooring, for ceilings and for forms into which concrete is poured. In addition, hardboard has a wide variety of uses in other industries such as for the interiors of automobile bodies, street cars, railroad cars, and steamships, and for use in the manufacture of furniture, toys, advertising displays, cabinets and counters, and motion picture sets. There are other materials which can be and are in fact used in some cases as substitutes for hardboard for various purposes. While no one of these commodities is fully capable of being put to all of the uses for which hardboard in its various forms is suitable, one or more of these other commodities is capable and is in fact being put to each use for which hardboard in its various forms is suitable. The amount in money of the retail sales of hardboard by retail building material dealers is estimated to be substantially less

than 1% of the amount in money of sales of building materials by retail building material dealers.

6. The Celotex Corporation (hereinafter sometimes referred to as "Celotex") is a Delaware corporation, with its principal business office in Chicago, Illinois, and is a large manufacturer and national distributor of structural insulation products; it
1051 manufactures gypsum products at its plant at Fort Clinton, Ohio, and distributes the same in the territory logically served by such plant, and distributes on a national scale, as principal or as agent, largely through retail lumber dealers, roofing, gypsum products, and certain other miscellaneous building products manufactured by others. The Celotex Corporation is the present owner of 23.6% of the common stock of Certain-teed Products Corporation hereinafter described. Defendant Certain-teed Products Corporation is a Maryland corporation, with its principal business office in New York, N. Y., is a manufacturer of roofing and gypsum products, and since 1932 has distributed structural insulation products; defendant Johns-Manville Sales Corporation is a Delaware corporation, with its principal business office in New York, N. Y., and is a subsidiary of Johns-Manville Corporation, which both directly and through subsidiaries is a large manufacturer of roofing, insulation, and allied building materials, and other commodities not connected with the building trade; defendant Insulite Company (sometimes hereinafter referred to as "Insulite") is a Minnesota corporation, with its principal business office located at Minneapolis, Minnesota, organized for the purpose of distributing fiber structural insulation board produced from waste products resulting from paper making and from other materials, and since 1925 has been a large producer and distributor of structural insulation board; defendant The Flintkote Company is a Massachusetts corporation, with its principal business office in New York, N. Y., engaged in manufacturing and selling asphalt products, principally industrial emulsions and asphalt roofing materials; since 1930 it has produced and sold other types of building materials; in 1935 it began the distribution, and in 1941 the manufacture, of fibre structural insulation board; defendant National Gypsum Company is a Delaware corporation with its principal business office at Buffalo, New York, and is a large producer of gypsum products and a distributor of various materials, including
1052 building materials, and including structural insulation board since about 1930; defendant Wood Conversion Company is a Delaware corporation, with its principal business office at Cloquet, Minnesota, distributing insulation products and other building materials; defendant Armstrong Cork Company is a Pennsylvania corporation, with its principal business office in

Lancaster County, Pennsylvania, and since 1860, has been a large manufacturer of flooring, glass, and closure materials, building materials, and other commodities not connected with the building trade; and defendant Dant & Russell, Inc., is an Oregon corporation, with its principal business office at Portland, Oregon, and is a distributor of fiber structural insulation board and allied building materials. The nature and description of the principal products manufactured and/or sold to the building trades by the various defendants are set out in Exhibits S-2 to S-10 in the Stipulation of Facts.

7. The Celotex Company (predecessor of the present defendant, The Celotex Corporation) was, as early as 1920, a pioneer in the development of structural insulation. It built a large plant at Marrero, Louisiana, for the manufacture of structural insulation board made from bagasse, the waste material resulting from the manufacture of sugar from sugar cane grown in Louisiana. Through intensive research, advertising and promotional work, it secured widespread public acceptance of structural insulation as a building material. As a result of the public demand for structural insulation so created, other companies were successively attracted to this field and built plants for the manufacture of structural insulation. There are now a large number of companies manufacturing and/or distributing structural insulation board which is distributed through the over 20,000 retail lumber dealers throughout the country.

1053 8. Masonite entered the structural insulation field, as well as the hardboard field, in 1926 and secured approved railroad tariff schedules permitting carlot rates to apply to shipments containing both hardboard and structural insulation board in the same car. This placed The Celotex Company at a competitive disadvantage as its customers for structural insulation board could not secure mixed car shipments at carlot rates unless The Celotex Company was able to supply a hard board product.

9. In view of the commercial conditions then existing, The Celotex Company, in or about 1929, started the manufacture at its Marrero plant of a hard panel board also made from bagasse. This product had similar physical characteristics to hardboard and was capable of being used for most of the purposes for which hardboard was used. The hard panel board products, as at first manufactured by The Celotex Company, were of varying quality and strength and in many instances were of lighter weight and lesser strength than Masonite's hardboard products. The Celotex hard panel board was sold in interstate commerce in competition with Masonite's hardboard products and was marketed at prices lower than those at which Masonite sold its hardboard products.

10. Masonite at once charged The Celotex Company with infringement of a number of its patents, including said patent No. 1,663,505, and in 1931 instituted suit against The Celotex Company in the District Court in Delaware for infringement of said patent No. 1,663,505. This patent suit was pending before the District Court of the United States for the District of Delaware, in June, 1932, when a petition was filed in the same Court for the appointment of receivers for The Celotex Company. That Court appointed receivers and one of such receivers was immediately thereafter appointed ancillary receiver by the District
1054 Court of the United States for the Northern District of Illinois, Eastern Division. These receivers conducted the business of The Celotex Company throughout the further course of such patent litigation and were directed to and did assume the defense thereof. This patent litigation was bitterly contested and finally resulted in a decision by the Circuit Court of Appeals for the Third Circuit on July 6, 1933, holding two product and four process claims of said patent valid and infringed. Masonite Corporation v. The Celotex Co., 66 F. (2d) 451. Masonite was thus left with a final decision adjudicating the validity of a number of basic claims of the patent, and construing these claims with a sufficient breadth to cover the Celotex product made from bagasse.

11. The problem confronting the Celotex receivers on July 6, 1933, when the decision of the Circuit Court of Appeals came down, was a serious one, for it was realized that, if the decision stood, The Celotex Company would be cut off from a supply of hard panel board to round out its line of building products, and it would have to face a large claim by Masonite for damages and profits. It was also felt that there was little chance that the decision would be reviewed by the Supreme Court because the decision rested largely on factual findings and there was an absence of conflicting rulings in different circuits.

12. The problem for Masonite was likewise a difficult one even though it had succeeded in the patent litigation; the credit of the company was seriously impaired, the operations at the Laurel plant were almost at a complete standstill, and urgent measures were required to keep the business alive. What Masonite particularly needed was a larger national distribution of its products, and it was realized that this could only be obtained by securing a much greater number of dealer contacts than it then possessed. The Celotex Company had these contacts, and
1055 it was thought that some settlement of existing differences between the two companies might be worked out by which the Celotex dealer contacts would be made available to Masonite in the distribution of hardboard products. It was with this

mainly in view that negotiations looking to a settlement were opened with the Celotex receivers, and after considerable discussion, the terms of an agreement were arrived at which constituted the receivers of The Celotex Company an agent of Masonite to sell Masonite hardboard products.

13. The aforesaid agreement, dated October 10, 1933, was accompanied by a separate supplemental agreement, also dated October 10, 1933, containing the terms of settlement of the patent litigation involving Patent No. 1,663,505, releasing The Celotex Company and its receivers of any claim of Masonite for profits or damages, and providing that if Masonite should make any agreement with respect to the sale of hardboard products on terms more favorable to the agent than contained in the said agreement of October 10, 1933, with the receivers of The Celotex Company, then such receivers or their successor in reorganization would be entitled to the benefit of such terms. As a part of the agreement, Celotex agreed to withdraw the petition for a writ of certiorari which had been filed in the Supreme Court of the United States.

14. These agreements were executed by one of the Celotex receivers acting under court direction and authority. On the conclusion of the reorganization proceedings relating to The Celotex Company in 1935, said agreements were assumed under court authority by the reorganized company, The Celotex Corporation, one of the present defendants. Masonite was never willing to and never did make any cross license arrangement with Celotex.

1056 15. In making said agreements there was no understanding with Masonite that it would make any agreement with any other concern or concerns to distribute or market its hardboard, and there was no expectation or desire on the part of the receivers or representatives of The Celotex Company that Masonite would or should do so. In the making of said agreement there was no participation whatever by any of the other defendants not parties thereto, and no conspiracy, intent, or purpose on the part of anyone to restrain or monopolize interstate or foreign trade or commerce.

16. It was the intent and purpose of the said agreement of October 10, 1933, and of the parties thereto to constitute the receivers of The Celotex Company and their successor in reorganization an agent of Masonite in the distribution and selling of hardboard on the terms and conditions set forth therein; and it was not the intent and purpose of the said agreement or of the parties thereto to constitute the receivers of The Celotex Company or their successor in reorganization a buyer from Masonite of the hardboard which was the subject thereof, or that title to such hardboard should pass from Masonite to such receivers

or their successor, whether or not such hardboard was delivered by Masonite into the possession of the receivers of The Celotex Company or their successor in reorganization.

17. Separate agreements similar to the agreement referred to in Finding 12 and certain supplemental agreements were executed severally between Masonite and the companies named in the following table and on the dates therein stated:

1058 Title of agreements	Company	Date
Agency Agreement and License Option	National Gypsum	October 31, 1933.
Agency Agreement and License Option, Supplemental Agreement.	Johns-Manville Sales	November 30, 1933.
Agency Agreement and License Option, Supplemental Agreement.	Armstrong Newport Co.	December 1, 1933.
Agency Agreement and License Option	Hawaiian Cane Products, Ltd.	December 4, 1933.
Agency Agreement and License Option, Supplemental Agreement.	Wood Conversion	June 25, 1934.
Agency Agreement and License Option, Supplemental Agreement.	Insulite	February 2, 1935.
Export Agreement	Insulite	February 2, 1935.
Supplemental Agreement	Insulite	February 8, 1935.

Pursuant to the provisions of the said various agreements, Masonite at the time of making each of said agreements informed the other party thereto of the existence and terms of each of the prior agreements similar to that referred to in Finding 12. Each of these corporations was engaged in manufacturing and/or selling building products, and all needed Masonite patented hardboard to complete their respective selling lines. The remaining defendants (other than Masonite) later severally executed agreements with Masonite substantially similar as to the relationship created thereby, to the agreements in force at the time with other defendants, as more specifically set forth in Finding 25 hereof.

18. During the year 1930 Insulite began the production of 1058 an artificial hardboard having physical characteristics similar to the hardboard manufactured by Masonite and claimed to have patents or application relating thereto. A portion of this product was sold directly by Insulite, and some of it was sold to the defendant Wood Conversion Company for resale. On March 3, 1934, Masonite commenced an infringement suit in the United States District Court of Pennsylvania against the Faxon Lumber Company, a dealer in Insulite hardboard, charging infringement of Masonite's United States patent No. 1,663,505. Insulite was a wholly owned subsidiary of the Minnesota and Ontario Paper Company, a Maine corporation, with its principal office in Minneapolis, Minnesota, which was then in an equity receivership in the United States District Court of Minnesota. The receivers for that company, acting pursuant to court order, caused its subsidiary, Insulite Company, to assume the defense of the Faxon Lumber Company suit.

19. In 1934, trustees were appointed for the Minnesota and Ontario Paper Company under Section 77B of the Bankruptcy Act and said trustees, acting pursuant to an order of the court, authorized the settlement of the Faxon Lumber Company suit and the execution of an agreement between Insulite and Masonite similar to the agreement referred to in Finding 12. The Faxon Lumber Company suit was settled and dismissed without prejudice to the patent claims of either party, prior to the time when an answer had been filed therein. As an incident to the settlement of said suit, there were also certain supplemental agreements entered into which were necessary for the termination of the litigation and the avoidance of conflicting patent claims. All of these agreements were entered into in good faith and approved by the court.

20. In negotiating and entering into the various agreements with Masonite referred to in Findings 12, 17, and 19, each
1059 of the defendants (other than Masonite) acted independently of every other defendant, and no communication, conference or discussion was had with any other defendant (excepting Masonite) as to the terms or provisions of any of said agreements. None of said defendants, while negotiating with Masonite, ever communicated in any manner with any other defendant who was then negotiating, or who thereafter negotiated, with Masonite with respect to the said agreements. It was in the interest of each of the defendants negotiating with Masonite to make an agreement to secure the right to distribute hardboard regardless of the action that might be taken by any other defendant in securing such rights, and no such defendant had any other purpose.

21. No defendant, in connection with its negotiations with Masonite with reference to the various agreements mentioned in Findings 12, 17, and 19, imposed as a condition to the making or continuation of its agreement with Masonite that the same or a similar agreement would be made with any other distributor of building materials. No representative of Masonite ever stated to any representative of any other defendant that Masonite's willingness to enter into an agreement with said defendant was conditioned upon the hope or expectation that Masonite would be able to make the same or similar agreements with any other person, firm, or corporation, or that Masonite planned or desired to limit in number those it would permit to obtain and distribute hardboard. No representative of any defendant ever had any discussion, prior to the execution of these agreements, with any representative of any other company which had theretofore or had thereafter entered into a similar agreement with Masonite con-

cerning any of the terms of such similar agreement made or to be made by any such defendant with Masonite or as to whether any such defendant was carrying on negotiations with respect to such agreement with Masonite.

1060 22. No defendant, nor any representative of any defendant, ever suggested or requested the insertion in any agreement with Masonite of any provision for the fixing of prices or the limiting of the class of customers to which it might distribute hardboard or the limiting of the manufacture or production of hardboard.

23. In the operation of the agreements referred to in Findings 12, 17, and 19, there were minor controversies engaged in in good faith on both sides between Masonite and various other defendants with respect to the meaning of certain provisions of the agreements; and on October 29, 1936, superseding agreements were executed between Masonite and each of the other defendants who had executed the previous agreements, clarifying the language on the disputed points. A like superseding agreement was entered into for the same purpose between Masonite and Hawaiian Cane Products, Ltd., which was thereupon assigned (except as to its application to the Hawaiian Islands) to Certain-teed Products Corporation. Prior to the execution of said superseding agreements, Celotex and each of the companies named in Finding 17 were fully informed of the agency agreements referred to in Findings 12 and 17 and had received copies thereof. Each of said companies knew prior to October 29, 1936, that an agency agreement substantially identical with the agency agreement which it proposed to make with Masonite was proposed to be made by Masonite with Celotex and each of the companies listed in Finding 17 hereof. The assent of the companies mentioned was set forth in various identical escrow agreements, by the terms of which the proposed agency agreements were to become effective as to each of the parties thereto only when all of said companies had agreed to the terms of their respective contracts. These superseding agreements were not intended to and did not change

1061 the nature of the relationships created by the earlier agreements, and continued to be operative until after the present suit was started.

24. Although when the agreements referred to in Finding 23 were executed each of the parties knew of the proposed execution of other similar agreements between Masonite and other defendants, said agreements were not made pursuant to or as a result of any conspiracy or concerted action to fix prices or restrain or monopolize trade or commerce, interstate or foreign, in hardboard or any product similar thereto or competitive therewith.

25. On March 16, 1937, Masonite entered into an agency agreement with Flintkote. Prior to the date of the execution of said agreement, Flintkote had heard and believed that Masonite had entered into agency agreements with other companies for the distribution of hardboard. On June 19, 1937, Dant & Russell entered into a similar agency agreement and at that time knew that there existed agency agreements between Masonite and several other defendants for the distribution of hardboard. Neither of said agreements was made pursuant to or as a result of any conspiracy or concerted action to fix prices or restrain or monopolize trade or commerce, interstate or foreign, in hardboard.

26. In 1937 and 1938 Masonite was involved in an interference proceeding in the United States Patent Office with Insulite, and Masonite asserted that a Finnish subsidiary of Insulite was infringing Finnish patents of Masonite. These matters were compromised and settled, and their Export Agreement of February 2, 1935, and their further supplement thereto of February 8, 1935, were modified by an agreement between Masonite and Insulite which was entered into on or about February 1, 1938. Said agreement provided for settlement of interferences upon exchange of data relative to priority, and said interference
1062 proceeding was settled in this manner with concession of priority made in favor of Insulite, and thereupon the interfering claims (which covered a process of making a hard board by means of pressure rolls) were awarded to Insulite and said claims were included in Insulite patent No. 2,134,659. Insulite licensed Masonite under said patent in the agreement of February 1, 1938, aforesaid. On March 20, 1941, Masonite and Insulite entered into a supplemental agreement which continued the provisions of said agreement of February 1, 1938, in full force and effect. These agreements were made in good faith and solely with the intent and purpose of avoiding litigation and not with the intent and purpose of restraining or monopolizing interstate trade or commerce.

27. After the present suit was started, an effort was made after notification to the Government as set forth in the stipulations of fact herein, to remove from the agreements a number of provisions which had been criticized by the Government. This resulted in the preparation of entirely new and superseding agreements, which were executed separately by all of the defendants, dated March 20, 1941, but which actually became effective April 1, 1941, and which did not contain many of the provisions of the previous agreements to which the Government had made objection. These agreements were not intended to and did not change the fact of agency created by the earlier agreements and are now in full force and effect.

28. The agreements referred to in Findings 17, 19, 23, 25, and 27 were made by the respective parties thereto with the intent and purpose of constituting the defendants (other than Masonite) severally agents of Masonite in the distribution and selling of hardboard on the terms and conditions set forth therein; and it was not the intent and purpose of the said agreements or of the parties thereto to constitute the said defendants as buyers
1063 from Masonite of its hardboard, or that title to such hardboard should pass from Masonite to such defendants, whether or not such hardboard was delivered by Masonite into the possession of the said defendants. The said agreements were made in good faith for the purpose of meeting the need of Masonite for larger distribution and the separate need of each of the said distributors to have hardboard included in the line of building materials being sold by it.

29. The said agreement of October 10, 1933, with the receivers of The Celotex Company and the said supplemental agreement of the same date, referred to in Findings 12 and 13, and the other agreements, referred to in Findings 17, 19, 23, 25, and 27, were each entered into in good faith by the parties thereto and not as the result or in furtherance of any combination or conspiracy; and they were so entered into not for the purpose of restraining or monopolizing interstate or foreign trade in hardboard or other products but with the honest and sincere intent to recognize and exercise the rights belonging to Masonite under its aforesaid patents.

30. The actual effect of the agreements entered into between Masonite and the various other defendants was to increase greatly the manufacture and distribution of hardboard, without increase in price to the consumer, and to promote competition between dealers therein.

31. There was not at any time any secret, outside or verbal understanding or agreement relative to hardboard or other similar or competitive products or the distribution or sale thereof between any of the parties defendant, other than the said written agreements themselves; and the respective parties were scrupulous to fulfill the same.

32. Masonite under the various written agreements above
1064 described exclusively determined and determines (to the extent therein provided) the price at which the other respective parties may sell the hardboard products of Masonite, which price is the price at which Masonite itself sells; and there never had been any influence or control or any attempt by the other defendants to influence or control such determination by Masonite, or by Masonite to influence or control the price after title to the hardboard products has once passed.

33. The defendants, other than Masonite, were all in the business of distributing products to the building industries and possessed strategically located warehouses, large sales forces, and a national distribution system with numerous contacts and outlets. The aforesaid written agreements were made with them by Masonite for the purpose of obtaining as much distribution of hardboard as possible. The said agreements were never used for ulterior purposes; nor was any attempt made by Masonite or the other defendants to control or affect in any wise the sale or price of insulation board or other products.

34. Since 1926 the costs of labor and materials entering into the manufacture of hardboard have very substantially increased, but the prices to the consumers, as evidenced by the dealer carload prices on various hardboard products, did not increase following the said agreements of 1933, and have not increased, but have remained at substantially the same or lower levels.

35. Hardboard is made in various types and thicknesses, but in one standard size, to wit, 12 feet by 4 feet. When these standard sizes are cut by Masonite at the request of other defendants in pieces of less than 5 feet in length, such pieces are called "shorts" and are not generally adaptable for use in the building trades. The remainder of the board so cut is known as a "long." The
1065 provisions in the aforesaid agreements of October 10, 1933, and in the similar agreements referred to in Findings 17, 19, 23, and 25, relating to "shorts" and the disposition thereof, were all made for the convenience of the respective parties to such agreements other than Masonite, and such "shorts" were in point of fact an incidental byproduct resulting from the fact that the distributor's customer desired to obtain a board shorter than standard. Such provisions constituted a reasonable method of dealing with such incidental byproduct, and were entered into without any intent or purpose to restrain or monopolize interstate or foreign trade or commerce. It was necessary for Masonite to dispose of such "shorts" at prices much lower than the standard length prices and in whatever trade channels it could find to absorb them.

36. In addition to the sale of hardboard for use in the building trades, hardboard is sold to industrial purchasers for use in manufacturing or fabricating processes. In the manufacture of hardboard it is not possible to produce all first quality products and a substantial amount of "seconds" or off-grade board is produced which, if sold for use in the building industry, would give Masonite a bad reputation as to the quality of its product, but which is wholly satisfactory for various industrial uses. Industrial purchasers are also able to use a substantial amount of "shorts." The problems relating to sales to industrial purchasers are very different from those relating to sales for use in the building industry and require trained industrial salesmen capable of performing

engineering and other services. Masonite had its own trained industrial salesmen. Masonite acted reasonably and within its rights in reserving to itself exclusively, under the aforesaid agreements, the right to make direct sales to industrial purchasers in order to find a market for "seconds" and off-grade board
1066 and to prevent such "seconds" and off-grade board from being sold to the retail lumber dealer and jobber trade to the detriment of its standard product and the reputation thereof, and in order to have a substantial market for its excess of "shorts."

37. Of the hardboard products sold to the building trades, approximately one-half is sold by Masonite directly and an equal amount through the other defendants under the said written agreements. There is competition between Masonite and the other defendants and between the other defendants themselves in securing orders for the purchase of hardboard products.

38. The scale of commissions paid by Masonite to the other defendants under the aforesaid written agreements was and is not unreasonable and was and is commensurate with the value of the services rendered by them and each of them in the distribution of hardboard under said agreements. In fixing the amount of such agreed commissions, it was mutually contemplated that the distributors would perform certain functions and absorb certain costs, such as freight, insurance, etc.

39. Masonite Patent No. 1,663,505 is a basic patent covering hardboard and the manufacturing process for making and producing hardboard. Various other defendants have been active for many years, both before and after the making of the aforesaid agreements, in attempting to find a substitute for the patented hardboard which would not infringe this patent, but without success. Neither the making of the various agreements aforesaid with Masonite nor the performance thereof by the other defendants discouraged or dissuaded any of the defendants from efforts to discover or develop noninfringing products or materials which might be sold by them in competition with patented products of Masonite.

Various defendants (other than Masonite) were willing and
1067 intended to terminate their respective agency agreements with Masonite whenever it should become commercially possible to offer a competitive noninfringing product similar to Masonite's hardboard. Many of the defendants have in fact distributed products which are in many respects competitive with hardboard.

40. There has been no monopoly or restraint in the manufacture, use or sale of hardboard other than the monopoly and restraint granted by valid United States Letters Patent lawfully owned

by Masonite. Masonite's patents on hardboard are fundamental and basic. No contracts or agreements were made by it or with any of the other defendants for the purpose of extending its lawful patent monopoly.

41. All acts by Masonite under its aforesaid United States Letters Patent have been done by Masonite in good faith, in the honest belief in the lawfulness thereof, and with no intent to injure or restrain the defendants or any of them in the exercise of any of their lawful rights or to injure the general public or any portion thereof.

42. There has been no evidence that any acts of Masonite or of any of the other defendants under the agreements in evidence constituted an exploitation of consumers or of the public or resulted in the receipt of exorbitant or unreasonable returns. On the contrary, the hardboard products of Masonite have at all times been and now are sold on price levels comparable with those of other cheap building materials and are in competition with many such building materials sold on similar levels and possessing the functions referred to in Paragraph 19 of the main Stipulation of Facts executed by all the parties hereto.

1068 43. There has at no time been, as between the defendants or any of them, any conspiracy, combination or concerted action to limit or restrain the manufacture or production of Masonite's patented hardboard or to establish the price thereof or to restrain competition between such hardboard and other commercial products.

44. The several defendants other than Masonite have been, and have acted as, agents of and distributors for Masonite under the aforesaid contracts made by them with Masonite.

45. The several stipulations of fact entered into in this case between the plaintiff on the one side and all the defendants on the other side, or between the plaintiff on the one side and the several defendants with reference to factual matters in their respective cases on the other side, were received in evidence by mutual agreement and made part of the record in this case. The Court accepts the said stipulations and each of them as constituting proof of the facts therein stated and finds such facts as part of its decision herein and accepts as true the testimony which, according to certain of such stipulations, would have been given by certain persons if they had been actually called as witnesses and testified in open court.

46. Hardboard manufactured by Masonite and sold directly and through the various defendants as distributors is, and during the years here involved has been, shipped in interstate commerce, including interstate commerce into the State of New York.

CONCLUSIONS OF LAW

1. The cause of action alleged in the bill of complaint not only has not been proved but has been disproved.

2. The conspiracy alleged in the bill of complaint had no existence.

1069 3. The agreements between Masonite Corporation and the other defendants were not violative of the Sherman Law or the Clayton Act.

4. The defendants did not violate the provisions of the Sherman Law or the Clayton Act.

5. The aforesaid agreements between Masonite Corporation and the other defendants were and are agreements creating agency relationships.

6. The agreements between Masonite Corporation and the other defendants did not and do not operate to transfer title to hardboard delivered by the former into the possession of the latter or consigned to the latter, and did not and do not constitute a sale thereof by the former to the latter.

7. Masonite Corporation has not misused any of its patent rights in any manner whatsoever.

8. The agreements made as of April 1, 1941, between Masonite Corporation and the other defendants were lawfully made; are not violative of the Sherman Law or the Clayton Act; are binding and in force as between the parties thereto; and are lawfully before the court in this case.

9. This Court would not be justified in granting any decree of injunction against the defendants or any of them.

10. The bill of complaint should be dismissed on the merits.

ALFRED C. COXE,
U. S. D. J.

Dated September 26th, 1941.

1070 In District Court of the United States For the Southern District of New York

Civil Action No. 7-498

UNITED STATES OF AMERICA, PLAINTIFF

v.

MASONITE CORPORATION, ET AL., DEFENDANTS

Final judgment

Filed Sept. 27, 1941

This action, having come on for trial upon the pleadings and proofs of the parties; and having been argued by counsel; and

the Court thereafter having filed its opion, findings of fact, and conclusions of law, wherein it directed that the Bill of Complaint be dismissed on the merits, now, therefore, it is hereby

Ordered, adjudged, and decreed that the Bill of Complaint be and the same is hereby dismissed on the merits.

(S) ALFRED C. COXE,
United States District Judge.

Dated September 26, 1941.

1071 In District Court of the United States
Southern District of New York

[Title omitted.]

Petition for appeal

To The Honorable ALFRED C. COXE, *Judge of the District Court of the United States for the Southern District of New York;*

The United States of America, plaintiff in the above entitled cause, considering it is aggrieved by the final order and decree of this Court entered on the 26th day of September 1941, does hereby pray an appeal from said final order and decree to the Supreme Court of the United States. Pursuant to Rule 12 of the Rules of the Supreme Court, the plaintiff presents to this Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause.

The particulars wherein the plaintiff considers the order erroneous are set forth in the Assignment of Errors and Prayer for Reversal accompanying this petition and to which reference is hereby made.

The plaintiff prays that its appeal may be allowed and that citation be issued as provided by law and that a transcript
1072 of the record, proceedings, and documents upon which said final order and decree was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

(Sgd.) THURMAN ARNOLD,
Thurman Arnold,
Assistant Attorney General,

(Sgd.) HUGH B. COX,
Hugh B. Cox,
Special Assistant to the Attorney General,

(Sgd.) SAMUEL S. ISSEKS,
Special Assistant to the Attorney General,
For the United States of America.

This 2nd day of October 1941.

1073 In District Court of the United States, Southern District of New York

[Title Omitted.]

Assignment of errors and prayer for reversal

The United States of America, plaintiff in the above-entitled cause, in connection with its petition for an appeal to the Supreme Court of the United States hereby assigns error to the record and proceedings and to the entry of the final order and decree of said District Court on September 26, 1941, in the above-entitled cause and says that in the entry of the final order and decree the said District Court committed error to the prejudice of the said plaintiff in the following particulars:

1. The court erred in holding that the defendants had not unlawfully contracted, combined, and conspired to restrain interstate trade and commerce in the manufacture, sale, and distribution of hardboard in violation of section 1 of the Sherman Act (15 U. S. C. 1). (Concl. of Law 2, 3, 4, and 8.)

2. The court erred in holding that the agreements executed between Masonite and the various defendants in the period between October 10, 1933 and March 20, 1941, established a bona
1074 fide agency relationship between Masonite and the various other defendants. (Concl. of Law 5, Finding of Fact No. 12, 13, 23, 25, 27, 39, 44.)

3. The court erred in refusing to hold that the said agreements were contracts for purchase and sale of hardboard whereby the defendants illegally fixed the resale price and terms and conditions of sale and thereby unlawfully restrained trade and commerce (Concl. of Law).

4. The court erred in holding that the defendants other than the Masonite Corporation, pursuant to the agreements between the defendants, did not assume the incidents and burdens of ownership, and that the said defendants were and are free to enlarge their legal responsibility by contract without affecting the agency relationship.

5. The court erred in holding that the agreements executed between the defendants in the period between October 10, 1933 and March 20, 1941 were in all material respects similar to the agreements between the A and B agents and General Electric Company in United States v. General Electric Co., 272 U. S. 476.

6. The court erred in holding that the other defendants have acted as agents and distributors for Masonite Corporation under the contracts in existence between the defendants during the period from October 10, 1933 through April 1, 1941 (Finding 44).

7. The court erred in holding that it was the intent and purpose of the defendants in entering into the agreements with

Masonite to constitute the defendants (other than Masonite) agents and not purchasers of hardboard products, and in refusing to hold that it was the intent and purpose and effect of the agreements between Masonite and the other defendants that the defendants should purchase the hardboard and that the title to the hardboard should pass to the defendants (Finding 28).

1075 8. The court erred in holding that the defendants have not unlawfully contracted, combined, and conspired to restrain interstate trade and commerce in hardboard products by agreeing not to change the prices charged for hardboard products until after an agreed upon period of time has elapsed.

9. The court erred in refusing to find as a fact that at the respective time of agreements between Masonite and other defendants, Masonite agreed that it would adhere to the same prices in its sale of hardboard products which it fixed for the other defendants, and that it was the understanding of all of the defendants that the agreements between the defendants required Masonite to adhere to the prices and terms and conditions of sale fixed by Masonite for the other defendants.

10. The court erred in holding that the agreement between the defendants whereby Masonite agreed with the other defendants to adhere to the same prices and terms and conditions of sale for hardboard products which it fixed for the other defendants was not an unlawful agreement.

11. The court erred in finding as a fact that there is now competition between the defendants in securing orders for hardboard, and in refusing to find as a fact that although the defendants solicit the same customers in the same market, the defendants have agreed to follow and do follow the same prices and terms and conditions of sale when selling hardboard products.

12. The court erred in holding that an agreement between competing manufacturers, who sell in the same market and solicit the same customers, fixing the prices and terms and conditions of sale and allocating customers and apportioning markets is a reasonable and lawful agreement and not an unreasonable and unlawful agreement in restraint of interstate trade and commerce (Concl. of Law 2, 3, 4, 8).

1076 13. The court erred in holding that the agreement between the defendants whereby customers for hardboard products were classified and allocated and whereby the market for hardboard products was divided by the defendants, the industrial customers being reserved exclusively for Masonite, was a lawful agreement under the antitrust laws.

14. The court erred in holding that the provisions of the contracts between the defendants whereby Masonite only was permitted to sell to industrial purchasers were and are reasonable

and necessary in order to provide a means of selling and distributing "off grade" hardboard products (Finding 36).

15. The court erred in holding that "shorts" are an incidental by-product which must be sold at lower prices in whatever trade channels can be found, and that the provisions of the contracts between the defendants pertaining to "shorts" were reasonable and lawful under the antitrust laws (Finding 35).

16. The court erred in holding that the Masonite patent No. 1663505 or other Masonite patents are fundamental and basic patents, and in holding that the Circuit Court of Appeals for the Third Circuit in Masonite Corp. v. Celotex Co., 66 F. (2d) 451, had decided that any of the Masonite patents was fundamental and basic (Findings 2, 10, 39, 40).

17. The court erred in finding as a fact that none of the defendants had discovered or developed a method of manufacturing hardboard which did not infringe Masonite's patents (Finding 39).

18. The court erred in holding that the other defendant companies have not patented processes or developed or discovered other processes for the manufacture of hardboard which did not infringe Masonite's patents, and in refusing to hold that the substitute processes available to the defendants were not utilized and were illegally suppressed by the agreements existing between the defendants.

1077 19. The court erred in refusing to find as a fact that Masonite and Celotex both believed that if a writ of certiorari were granted by the Supreme Court in the case of Masonite Corp. v. Celotex Co., 66 F. (2d) 451, the Supreme Court probably would invalidate Masonite's patent.

20. The court erred in holding that there was little chance that the decision of the Circuit Court of Appeals for the Third Circuit in Masonite Corp. v. Celotex Co., 66 F. (2d) 451, would be reviewed by the Supreme Court because of the absence of conflicting rulings in different circuits (Finding 11).

21. The court erred in holding that Masonite and Celotex companies had not negotiated during the pendency of the patent litigation for a cross-license or patent-pooling agreement, and for refusing to hold that Masonite and Celotex had negotiated for the purpose of entering into an unlawful agreement, pooling patents and patent applications, and fixing prices for hardboard and otherwise unlawfully restraining interstate trade and commerce in hardboard products.

22. The court erred in holding that insulation board and other non-patented materials are not involved in this suit (Finding 2).

23. The court erred in refusing to hold that Masonite has attempted to use and has improperly used, its patent privileges unlawfully to fix prices on, and otherwise to control, and to secure

a monopoly over, the sale and distribution of unpatented materials when sold in combination with hardboard (Concl. of Law 7, Findings 33, 40).

24. The court erred in refusing to hold that the defendant companies are all large corporations engaged in the manufacture and sale or distribution of various building materials including fiber structural insulation board, and that collectively defendant companies dominate both the hardboard and the insulation board industries.

1078 25. The court erred in refusing to hold that the defendants, all large manufacturers of insulation board, have sold insulation board products in interstate commerce including interstate commerce into the Southern District of the State of New York.

26. The court erred in refusing to find as a fact that the Masonite Corporation had determined as a matter of policy that it would enter into contracts for the distribution and sale of hardboard products only with concerns which manufactured and sold, or distributed, insulation board products, and that Masonite refused to enter into an agreement with any company unless that company manufactured or distributed insulation board products.

27. The court erred in holding that the agreements between the defendants by which patents and patent applications were combined and pooled were not agreements which unlawfully and unreasonably restrained interstate trade and commerce in hardboard products.

28. The court erred in holding that the defendants had not unlawfully contracted, combined, and conspired to restrain interstate trade and commerce in hardboard products by controlling and attempting to control the distribution and sale of unpatented materials when sold in combination with hardboard products (Finding 33, 40, Concl. of Law 7).

29. The court erred in refusing to find that Masonite induced Insulite to cease the manufacture of hardboard products for sale in the United States and to join the combination and conspiracy to fix and control the price of hardboard and to restrain interstate trade and competition in the sale of hardboard products.

30. The court erred in holding that the agreement between Masonite and Insulite did not constitute an illegal pooling and suppression of patents and an improper use of patents unlawfully to restrain interstate trade and commerce (Finding 26).

37. The court erred in holding that the defendants had not unlawfully contracted, combined, and conspired to prevent the defendants other than Masonite from handling, selling, or distributing any commodity competitive with hardboard products in violation of the antitrust laws (Concl. of Law 3, 4, 8).

38. The court erred in finding as a fact that the defendants had distributed and sold commodities competitive with hardboard (Finding 39).

39. The court erred in finding as a fact that prices for Masonite hardboard products had not increased substantially during the period October 10, 1933, up to and including January 1, 1941 (Finding 30, 34).

40. The court erred in refusing to find as a fact that Masonite had determined as a matter of policy that it would not enter into any contractual relations with any company for the purpose of selling hardboard, unless Masonite retained the power to fix the price and determine the class of customers to which that concern would sell.

41. The court erred in holding that the defendants did not intend unlawfully to restrain interstate trade and commerce and monopolize and attempt to monopolize interstate trade and commerce in hardboard products (Finding 24, 29, 41).

42. The court erred in holding that there were no secret or verbal understandings or agreements relative to hardboard or other competitive products between the defendants (Finding 31).

43. The court erred in holding that the defendants have separately executed agreements with Masonite which consti-
1081 tuted the defendants (other than Masonite) agents of Masonite, and in refusing to hold that the defendants had jointly contracted, combined, and conspired to restrain and monopolize trade and commerce in violation of the Sherman Act (Findings 17, 23, 25, 27, 28, 43, Concl. of Law 2).

44. The court erred in holding that the agreements between the defendants were executed severally and there was no communication between the defendants with respect to the negotiations for the agreements and in refusing to hold that the defendants had acted jointly in the negotiations and in entering into the agreements and with full knowledge on the part of each of the defendants that similar contracts were being executed by Masonite and the other defendants (Findings 17, 21, 23, 27, 43, Concl. of Law 2).

45. The court erred in refusing to hold that each of the defendants had entered into the said agreements upon the condition, expectation, and understanding that similar agreements would be made by Masonite with the other defendants for the purpose of fixing the price and terms of condition of sale for hardboard products and allocating customers and apportioning the markets for hardboard products.

46. The court erred in refusing to find as a fact that prior to October 10, 1933, certain of the defendants had received copies of proposed agreements substantially identical with the agreements subsequently executed by each of said defendants with

Masonite and that said defendants were informed that Masonite proposed to enter into similar agreements with other companies for the distribution of hardboard.

47. The court erred in refusing to find as a fact that prior to the date of the execution of the agreements referred to in Finding of Fact No. 17 each of the defendant companies knew of the existence and the terms of all previous agreements which Masonite had entered into for the distribution of hardboard products.

1079 31. The court erred in holding that Masonite Corporation had not entered into an unlawful combination, conspiracy, and agreement whereby the scope of its patent grants were extended for the purpose of controlling subject matter not within the scope of those grants and for the purpose of unlawfully restraining interstate trade and commerce in hardboard products (Finding 33, 40).

32. The court erred in holding that if the agreements made between Masonite and the other defendants between October 10, 1933 and March 20, 1941 were true agency agreements, the case was controlled by the decision in United States v. General Electric Co. 272 U. S. 476, and in refusing to hold that even if the said agreements were true agency agreements, the decision in United States v. General Electric Co., 272 U. S. 476, had no application to the facts of this case and the said agreements are nevertheless illegal under the antitrust laws.

33. The court erred in holding that the defendants had not combined and conspired unlawfully to monopolize and attempt to monopolize interstate trade and commerce in hardboard products (Concl. of Law 2, 3, 4, 8).

34. The court erred in holding that by the agreements between the defendants, Masonite had not attempted to use and had not used, its patents and patent applications unlawfully as a means of monopolizing interstate trade and commerce in hardboard products.

35. The court erred in holding that the defendants had not combined and conspired unlawfully to attempt to monopolize and to monopolize interstate trade and commerce in hardboard products by using the patents and patent applications owned by the defendants or controlled by the defendants as a means to control and eliminate competition in the sale of unpatented products (Finding 33, 40, Concl. of Law 7).

36. The court erred in holding that the defendants had not unlawfully combined and conspired to attempt to monopo-

1080 lize and to monopolize interstate trade and commerce in hardboard products by pooling patents and patent applications and by entering into cross-license agreements (Concl. of Law 3, 4, 7, 8).

1082 48. The court erred in refusing to hold that during the pendency of the present litigation the defendants, acting jointly, agreed upon the contract dated March 20, 1941, and that each defendant knew prior to that date that a substantially identical agreement was to be made between Masonite and each of the other defendants.

49. The court erred in holding that the defendants other than Masonite had not suggested inclusion in the contracts of terms and conditions fixing and determining the price and terms of condition of sale and classifying customers and apportioning markets for hardboard products (Finding 22).

50. The court erred in sustaining the defendants' objection to the introduction into evidence of plaintiff's exhibit 1 for identification, a letter from James P. Gillies to W. H. Mason dated October 31, 1932.

51. The court erred in sustaining the defendants' objection to the introduction into evidence of plaintiff's exhibit 3 for identification, a letter from H. H. Dyke to James P. Gillies dated August 23, 1933.

52. The court erred in sustaining the defendants' objection to the introduction into evidence of plaintiff's exhibit 4 for identification, a letter from H. H. Dyke to James P. Gillies dated August 24, 1933.

53. The court erred in sustaining the defendants' objection to the introduction into evidence of exhibit 10, a letter from H. H. Dyke to James P. Gillies dated September 13, 1932.

54. The court erred in sustaining the defendants' objection to the introduction into evidence of exhibit 16 for identification, a letter from James P. Gillies to H. H. Dyke dated April 7, 1932.

55. The court erred in sustaining the defendants' objection to questions asked James P. Gillies, and in refusing to permit James P. Gillies to testify concerning conferences between James P. Gillies and other officers and agents of the Masonite Corporation with reference to a code of ethics for the synthetic wood industry.

1083 56. The court erred in overruling the plaintiff's objections to questions asked James P. Gillies and in allowing James P. Gillies to testify concerning his state of mind with respect to policy expressed in plaintiff's exhibit 2, a letter from James P. Gillies to Harold C. Harvey dated December 6, 1933.

57. The court erred in overruling plaintiff's objection to questions asked Bror G. Dahlberg and in permitting Bror G. Dahlberg to testify concerning the motives and business reasons which induced Celotex to enter into the agreements with Masonite.

58. The court erred in overruling and denying plaintiff's motion to strike certain paragraphs in the narrative statement of testimony filed by certain defendants and in permitting representatives of those defendants to testify by narrative testimony con-

cerning the intentions and motives which induced them to enter into agreements with Masonite.

59. The court erred in holding that the scale of commissions was reasonable and commensurate with the value of the services rendered by the defendants (Finding 38).

60. The court erred in holding that as a result of the agreements between the defendants the public and the consumer were not exploited and that the agreements between the defendants did not result in exorbitant or unreasonable returns to the defendants (Finding 42).

61. The court erred in holding that hardboard products are sold on price levels comparable with those of other cheap building materials (Finding 42).

62. The court erred in failing to enter such order or orders with respect to the contracts and agreements between the defendants as were and are consistent with right and justice within the laws of the United States.

1084 63. The court erred in entering the final order and decree dismissing the complaint.

Wherefore, plaintiff prays that the final order and decree of the District Court may be reversed and for such other and fit relief as to the court may seem just and proper.

(Sgd.) THURMAN ARNOLD,
Thurman Arnold,
Assistant Attorney General.

(Sgd.) HUGH B. COX,
Hugh B. Cox,

(Sgd.) SAMUEL S. ISSEKS,
Samuel S. Isseks,
Special Assistants to the Attorney General.

This 2d day of October 1941.

1085 In District Court of the United States, Southern District of New York

[Title omitted.]

Notice of appeal

To MASONITE CORPORATION, A CORPORATION; CELOTEX CORPORATION, A CORPORATION; CERTAIN-TEED PRODUCTS CORPORATION, A CORPORATION; JOHNS-MANVILLE SALES CORPORATION, A CORPORATION; INSULITE COMPANY, A CORPORATION; FLINTKOTE COMPANY, A CORPORATION; NATIONAL GYPSUM COMPANY, A CORPORATION; WOOD CONVERSION COMPANY, A CORPORATION; ARMSTRONG CORK COMPANY, A CORPORATION; AND DANT & RUSSELL, INC., A CORPORATION:

Please take notice that pursuant to the statutes anl rules of the court in such cases made and provided, the United States of Amer-

ica, plaintiff in the above entitled cause, does hereby appeal to the Supreme Court of the United States from the final order and decree of the District Court of the United States for the Southern District of New York entered on the 26th day of September 1941.

(Sgd.) THURMAN ARNOLD,
Thurman Arnold,
Assistant Attorney General,

(Sgd.) HUGH B. COX,
Hugh B. Cox,
Special Assistant to the Attorney General,

(Sgd.) SAMUEL S. ISSEKS,
Samuel S. Isseks,
Special Assistant to the Attorney General,
For the United States of America.

This 2d day of October 1941.

1086 In District Court of the United States, Southern District of New York

Civil No. 7–498

UNITED STATES OF AMERICA, PLAINTIFF

v.

MASONITE CORPORATION, CELOTEX CORPORATION, CERTAIN-TEED PRODUCTS CORPORATION, JOHNS-MANVILLE SALES CORPORATION, INSULITE COMPANY, FLINTKOTE COMPANY, NATIONAL GYPSUM COMPANY, WOOD CONVERSION COMPANY, ARMSTRONG CORK COMPANY, AND DANT & RUSSELL, INC., DEFENDANTS

Order allowing appeal

In the above-entitled cause the United States of America, plaintiff, having made and filed its petition praying an appeal to the Supreme Court of the United States from the final order and decree of this Court in this cause entered on the 26th day of September 1941, and having also made and filed its Petition for Appeal, Assignment of Errors and Prayer for Reversal, and Statement of Jurisdiction, and having in all respects conformed to the statutes and rules of court in such cases made and provided, it is

Ordered and decreed that the appeal be and the same is hereby allowed as prayed for.

(Sgd.) ALFRED C. COXE,
United States District Judge for the Southern District of New York.

This 2d day of October 1941.

1086–A In District Court of the United States
Southern District of New York

[Title omitted.]

Praecipe for transcript of record

Filed October 23, 1941

To the Clerk of the United States District Court:

Please prepare a transcript of the record in the above-entitled cause in the matter of the appeal herein and include in said transcript in the order given below the following papers, viz:

1. Bill of complaint.

2. Answer of each defendant to said bill of complaint.

3. Supplemental answer of each of the following defendants: The Celotex Corporation, Certain-Teed Products Corporation, Johns-Manville Sales Corporation, Masonite Corporation, the National Gypsum Company, the Flintkote Company, and Armstrong Cork Company.

4. Supplemental pleading of the United States in the nature of a reply to the supplemental answer of the defendant Masonite Corporation, dated April 19, 1941.

5. Stipulation concerning the effect of plaintiff's reply to the supplemental answer of the defendant Masonite Corporation.

1086–B 6. Stipulation of facts dated April 22, 1941, and the exhibits attached thereto numbered S–1 to S–63A–, inclusive.

7. The official record of the stenographic minutes containing the transcript of evidence and proceedings before Alfred C. Coxe, United States District Judge, on April 23, 24, 25, 26, 29, 30, and May 1, 1941.

8. The following exhibits:

1. Plaintiff's exhibits numbered 1 to 10, inclusive, 13 to 16, inclusive, 16 to 33, inclusive, 35 to 40, inclusive.

2. Defendants' exhibits numbered A to V and SS–1 to SS–19, inclusive.

3. Exhibits attached to narrative testimony numbered F L–1 to F L–5, inclusive, I–1 to I–2, inclusive, JMS–1 to JMS–4, inclusive.

9. Plaintiff's motion to strike portions of narrative statement of testimony filed by certain defendants, dated May 1, 1941.

10. Opinion of Coxe, J., dated August 5, 1941.

11. Plaintiff's objections to proposed findings of fact and conclusions of law as modified, proposed by the defendants for

adoption by the court, and a request for supplemental findings of fact, dated September 25, 1941.

12. Findings of fact and conclusions of law filed September 27, 1941.

13. Final order and decree of the district court dismissing the bill of complaint, dated September 26, 1941.

14. The petition for appeal.

15. The assignment of errors and prayer for reversal.

16. Notice of appeal.

1086-C 17. Order allowing appeal.

18. Praecipe for the transcript of the record.

19. Notice of serving appeal papers.

20. Stipulation as to transmitting original documents.

21. Application for order approving stipulation as to transmitting original documents.

22. *Order approving stipulation as to transmitting original documents.*

23. Citation.

24. Statement of Jurisdicition.

25. Stip. *re* correctness of Record.

26. Clerk's ctf.

(S) HUGH B. COX,
Hugh B. Cox,
Special Assistant to the Attorney General.

(S) S. S. ISSEKS,
S. S. Isseks,
Special Assistant to the Attorney General.

This 23d day of October 1941.

1086-D Service of the foregoing Praecipe for Transcript of Record and receipt of a copy thereof are hereby acknowledged this 22nd day of Oct. 1941.

Charles H. Tuttle, on behalf of all attorneys listed above; Breed, Abbott & Morgan, Attorneys for Defendant Masonite Corporation; Cravath, De Gersdorff, Swaine & Wood, Attorneys for Defendant Celotex Corp.; Hughes, Richards, Hubbard & Ewing, Attorneys for Defendant Certain-Teed Products Corporation; Davis, Polk, Wardwell, Gardiner & Reed, Attorneys for Defendant Johns-Manville Sales Corporation; Milbank, Tweed & Hope, Attorneys for Defendant Insulite Company; Sullivan & Cromwell, Attorneys for Defendant Flintkote Company; Elmer B. Finck, Attorney for Defendant National Gypsum Company; Lawrence C. Hull, Jr., Attorney for Defendants Dant

& Russell, Inc., and Wood Conversion Company; LeBonuf, Machold & Lamb, Attorneys for Defendant Armstrong Cork Co.

1087 In the District Court of the United States, Southern District of New York

[Title omitted.]

Stipulation as to transmitting original documents

Filed Oct. 23, 1941

It is hereby stipulated and agreed by and between the parties hereto that the exhibits introduced in evidence during the trial and proceedings in this cause and in the hearings before the District Court, all as described in Exhibit A attached hereto and made a part hereof, shall be certified and transmitted by the clerk of this court to the Clerk of the Supreme Court of the United States as original papers not to be printed as part of the transcript of record on appeal; that they may be referred to by the parties in briefs and arguments to the same extent as though part of the transcript of record; and that this court may make such order relative to the transmittal, safe keeping, and return of such original documents as to it may seem proper.

It is further stipulated and agreed by and between the parties hereto that the Clerk of the Supreme Court shall indicate in the printed transcript of the record on appeal that the agreement called "Agency Agreement and License Option" between
1088 Masonite Corporation and National Gypsum Company, dated October 31, 1933, Ex. S–30, to be printed as part of the transcript of the record on appeal, is, except for the signatures of the parties and the date, identical with the agreements transmitted as original documents and not to be printed as part of the transcript of the record on appeal, between Masonite and the following companies: Johns-Manville Sales Company, "Agency Agreement and License Option" dated November 30, 1933, Ex. S–31; Armstrong Newport Company, "Agency Agreement and License Option" dated December 1, 1933, Ex. S–33; Hawaiian Cane Products, Ltd., "Agency Agreement and License Option" dated December 4, 1933, Ex. S–35; Agasqte Mill Board Company, "Agency Agreement and License Option" dated January 4, 1934, Ex. S–36; Wood Conversion Company, "Agency Agreement and License Option" dated June 25, 1934, Ex. S–38; and Insulite Company, "Agency Agreement and License Option" dated February 2, 1935, Ex. S–40.

It is further stipulated and agreed by and between the parties hereto that the Clerk of the Supreme Court shall indicate in the printed transcript of the record on appeal that the agreement called "Del Credere Factor's Agreement" between Masonite Corporation and the Celotex Corporation, dated October 29, 1936, Ex. S–44, to be printed as part of the transcript of the record on appeal, is, except for the signatures of the parties, identical with the agreements dated October 29, 1936, between Masonite Corporation and the following companies: Armstrong Newport Company, Hawaiian Cane Products, Ltd., Insulite Company, Johns-Manville Sales Corporation, National Gypsum Company, and Wood Conversion Company.

It is further stipulated and agreed by and between the parties hereto that the Clerk of the Supreme Court shall indicate in the printed transcript of the record on appeal that the
1089 agreement called "Del Credere Factor's Agreement" between Masonite Corporation and Flintkote Company, dated March 16, 1937, Ex. S–46, to be printed as part of the transcript of the record on appeal, is, except for the signature of the parties and the date, identical with the agreement between Masonite Corporation and Dant & Russell, Inc., called "Del Credere Factor's Agreement," dated June 19, 1937, Ex. S–47, transmitted as an original document and not to be printed as part of the transcript of the record on appeal.

It is further stipulated and agreed by and between the parties hereto that the Clerk of the Supreme Court shall indicate in the printed transcript of the record on appeal that the agreement called "Appointment of Agent" marked Ex. S–51, made and entered into March 20, 1941, and which became effective April 1, 1941, to be printed as part of the transcript of the record on appeal, is identical, except as to the signatures and dates, with the agreements between Masonite Corporation and the following companies: Celotex Corporation, National Gypsum Company, Johns-Manville Sales Corporation, Wood Conversion Company, Insulite Company, Certain-Teed Products Corporation, Flintkote Company, Dant & Russell, Inc., and Armstrong Cork Company.

(S) Hugh B. Cox, Hugh B. Cox, Special Assistant to the Attorney General; (S) Samuel S. Isseks, Samuel S. Isseks, Special Assistant to the Attorney General, For the United States of America; (S) Breed, Abbott & Morgan, Breed, Abbott & Morgan, Attorneys for De-
1090 fendant Masonite Corporation; (S) Cravath, De Gersdorff, Swaine & Wood, Cravath, De Gersdorff, Swaine &

Wood, Attorneys for Defendant Celotex Corporation; (S) Hughes, Richards, Hubbard & Ewing, Hughes Richards, Hubbard & Ewing, Attorneys for Defendant Certain-Teed Products Corporation; (S) Davis, Polk, Wardwell, Gardiner & Reed, Davis, Polk, Wardwell, Gardiner & Reed, Attorneys for Defendant Johns-Manville Sales Corporation; (S) Milbank, Tweed & Hope, Milbank, Tweed & Hope, Attorneys for Defendant Insulite Company; (S) Sullivan & Cromwell, Sullivan & Cromwell, Attorneys for Defendant Flintkote Company; (S) Elmer E. Finck, Elmer E. Finck, Attorney for Defendant National Gypsum Company; (S) Lawrence C. Hull, Jr., Lawrence C. Hull, Jr., Attorney for Defendants Dant & Russell, Inc., and Wood Conversion Company; (S) Le Boeuf, Machold & Lamb, Le Boeuf, Machold & Lamb, Attorneys for Defendant Armstrong Cork Co., Attorneys for the Appellees.

This 22 day of October 1941.

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Exhibit A

I

Exhibit No.	Description of exhibit
21 & 22	Samples of hard board produced by Celotex.
	Celotex Bulletins as follows: March 7, 1934; February 12, 1934; December 1, 1933; October 12, 1933; June 22, 1933; May 31, 1933; Celotex Price List of hard board and panel board products effective May 8, 1933; Celotex Bulletin of March 21, 1933; Price List of February 20, 1933; Bulletin of January 13, 1933; Bulletin of December 14, 1932; Price List of November 15, 1932; Celotex Bulletin of November 3, 1932; Celotex Bulletin of October 21, 1932; Celotex Bulletin of October 20, 1932; Brown Bulletin of September 30, 1932; Bulletin of July 8, 1932; Celotex Bulletin of June 27, 1932; Celotex Bulletin of April 13, 1932; Price List effective February 29, 1932; Western Price List of February 25, 1932; Celotex Bulletin of July 1, 1931 (East and West); Celotex Bulletin of April 2, 1931; White Bulletin of March 13, 1931 and record of earliest hard board sales prior to issuance of price list of March 13, 1931.
26	The Celotex Patents: 1,942,723, 1,881,418, 1,973,637, 1,949,917, 1,935,196, 1,880,972, 1,880,971, 1,880,965, 1,909,213.
27	3 Consolidated Reports of Celotex plus annual reports—Annual Reports as at November 1, 1935, October 31, 1936, October 31, 1937, October 31, 1939, October 31, 1938, October 31, 1940; Consolidated balance sheets as of October 31, 1932, 1933, and 1934.
31	Annual Reports of Armstrong Cork Company as of December 31, 1938, 1939, and 1940.
32	Annual Reports of Certain-teed Products as of December 31, 1938, 1939, and 1940.
1092 35	Annual Report of Johns-Manville Corp. for the year 1940.
36	Annual Report of National Gypsum Co.—December 31, 1940.
37	Two pamphlets published by The Flintkote Company advertising "Flintkote Hardboard."
38	Annual Reports of Flintkote as of December 31, 1937, 1938, 1939, and 1940.
39	Assets, Liabilities and Corporate Structure of Wood Conversion Company as of December 31, 1938, 1939, and 1940.
40	Insulite Balance Sheets as at December 31, 1939, 1940, and comparative income and profit and loss statement, December 31, 1940.

II

Exhibit No.	Description of exhibit
8-1	Book of Masonite's Patents.
8-14	June 16, 1932—Order of Federal Court (Delaware) appointing Celotex receivers.
8-15	June 17, 1932—Order of Federal Court (Illinois) appointing ancillary receiver.
8-16	February 8, 1935—Order of Federal Court (Delaware) appointing temporary trustees for Celotex Company.
8-17	March 1, 1935—Order of Federal Court (Delaware) appointing permanent trustees.
8-25	Federal Court (Delaware) decree of confirmation re Celotex plan of reorganization.
8-27	February 28, 1931—Order appointing Insulite receivers.
8-28	March 22, 1934—Order authorizing Insulite receivers to defend Masonite patent suit.
8-31	November 30, 1933—Masonite agreement with Johns-Manville.
8-33	December 1, 1933—Masonite agreement with Armstrong Cork.
1093 8-35	December 4, 1933—Masonite agreement with Hawaiian Cane Products, Ltd.
8-36	January 4, 1934—Masonite agreement with Agasote Millboard Company.
8-37	Supplemental agreement—Agasote and Masonite.
8-38	June 25, 1934—Masonite agreement with Wood Conversion Co.
8-40	February 2, 1935—Masonite agreement with Insulite.
8-47	June 19, 1937—Masonite agreement with Dant & Russell.
8-55	Masonite price lists.
8-60	United States Gypsum Co., dealer price lists.
8-61	United States Gypsum Co., wholesaler price lists—None available.
8-63A to 8-63H	Annual reports Masonite—August 31, 1933 to August 31, 1940.

III

88-1	Chart showing trend of dealer carlot prices in the Eastern Zone, 1926-1939.
88-2	Chart showing trend of average prices received from domestic hardboard sales by products, 1927-1939.
88-3	Analysis of savings achieved through carlot or mixed carlot purchases of hardboard—Eastern Zone prices effective February 1, 1940.
88-6	Chart showing trend of Masonite's manufacturing operations, 1927-1940.
88-8	Chart showing breakdown of Masonite's manufacturing costs, 1931-1940.
88-9	Index of monthly average dealer carlot prices of standard Presdwood—Eastern Zone Price, 1933-1939. (Overlay).
1094 88-10	Chart showing trend of material and of labor costs per thousand square feet of standard Presdwood produced, 1933-1939.
88-11	Index of monthly average dealer carlot prices of tempered Presdwood—Eastern Zone prices, 1933-1939. (Overlay).
88-12	Chart showing trend of material and of labor costs per thousand square feet of tempered Presdwood produced, 1933-1939.
88-13	Chart showing trend of Masonite's research expenditures, 1930-1940.
88-15	Map of the United States showing geographical location of hardboard jobbers.

IV

B1-19	Photographs.
C	15 samples of Masonite's presdwood temprtile tempered presdwood—presdwood deluxe quartrboard—wallboard 3/16", quartrboard.
D	Sample of Colored Masonite structural insulation.
E	Sample of Armstrong's Monowall—Plain No. 71.
G	Sample of Johns-Manville Decorative Flexboard.
H	Sample of Johns-Manville Decorative Flexboard.
I	Sample of French Blue Sanimetal Tile mfg'd. by Sanimetal Tile Corporation, 101 Park Avenue, New York.
IA	Samples of Insulite's Hardboard.
IB	Samples of Insulite's Hardboard.
J	Sample of Sheetrock of United States Gypsum Co.
K	Sample of Gold Bond Gypsum Wallboard, National Gypsum Co.
L	Sample of Cornell Tile Board #3, Cornell Wood Products Co.
1095 M	Sample of Carrara Structural Glass, Pittsburgh Plate Glass Co.
N	Sample of DeLuxe Weldbord, United States Plywood Corp.

V

Exhibit No.	Description of exhibit
FL-3	(1940 Annual Report of The Flintkote Company is submitted separately herewith.)
FL-5	Shipments of hardboard from warehouse at Fort Newark, N. J. direct to customers six accounting periods (of four weeks each) March 23, 1940 to September 7, 1940.

VI

I-2	The Insulite Company's patents relating to hardboard (folder containing list of patents and Letters Patent themselves).

VII

JMS-1	Photostat of sales bulletin 65.2-392, dated December 22, 1933.

1096 VIII

T	Catalog of Johns-Manville building materials.

1097 In District Court of the United States, Southern District of New York

[Title omitted.]

Application for order approving stipulation as to transmitting original documents

Filed Oct. 23, 1941.

Now comes the United States of American, plaintiff-appellant herein, and requests the Court to enter an order approving the Stipulation as to Transmitting Original Documents filed herein on the day of 1941.

(S) HUGH B. COX,
Hugh B. Cox,
Special Assistant to the Attorney General,

(S) SAMUEL S. ISSEKS,
Samuel S. Isseks,
Special Assistant to the Attorney General, for the United States of America.

This 22nd day of October 1941.

Defendants-appellees hereby acknowledge receipt of a copy of the above Application for Order Approving the Stipulation as to Transmitting Original Documents and consent to the entry by the Court of an order approving said Stipulation.

CHARLES H. TUTTLE,
On behalf of the Attorneys for Defendants-Appellees.

1098 In District Court of the United States, Southern District of New York

[Title omitted.]

Order approving stipulation as to transmitting original documents

Filed Oct. 23, 1941

Counsel for plaintiff-appellant in the above-entitled cause, having applied for an order approving the Stipulation as to Transmitting Original Documents filed herein in connection with the appeal allowed to the Supreme Court of the United States, and counsel for the several defendants-appellees having consented to the entry of such order, the Court being advised in the premises orders that the Stipulation as to Transmitting Original Documents as agreed upon by the parties, be and hereby is approved, and the clerk is ordered and directed to transmit to the Supreme Court of the United States the exhibits and documents set out in said stipulation.

(S) ALFRED C. COXE,
United States District Judge for the Southern District of New York.

This 22 day of October 1941.

Consented to:

CHARLES H. TUTTLE,
On behalf of the Attorneys for Defendants-Appellees.

1102 In United States District Court,
Southern District of New York

[Title omitted.]

Stipulation as to transcript of record

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated: October 28, 1941, New York, N. Y.

HUGH B. COX,
SAMUEL S. ISSEKS,
Special Assistants to the Attorney General,
Attorney for Plaintiff-Appellant.
CHARLES H. TUTTLE,
on behalf of ——— ———,
Attorneys for Defendant-Appellees.

1103 [Clerk's certificate to foregoing transcript omitted in printing.]

1104 In Supreme Court of the United States

Statement of points to be relied upon, designation of parts of the record necessary for consideration thereof

Filed Nov. 13, 1941

(1) Now comes the appellant in the above-entitled cause and for its statement of the points on which it intends to rely in its appeal to this court adopts the points contained in its assignment of errors heretofore filed herein.

(2) The appellant states that the following parts of the record are necessary for the consideration of the foregoing points and therefore designates them as parts of the record to be printed by the Clerk of the Supreme Court of the United States:

1. Bill of Complaint (pp. 8–54).
2. Answer of Masonite Corporation (pp. 55–93).
3. Supplemental Answer of Masonite Corporation (pp. 94–113).
4. Answer of Johns-Manville Sales Corporation (pp. 114–126).
5. Supplemental Answer of Johns-Manville Sales Corporation (pp. 127–129).

1105 6. Answer of Flintkote Company (pp. 130–142).
7. Supplemental Answer of Flintkote (pp. 143–145).
8. Answer of Celotex Corporation (pp. 146–175).

9. Supplemental Answer of Celotex Corporation (pp. 176–187).
10. Answer of Armstrong Cork Company (pp. 188–197).
11. Supplemental Answer of Armstrong Cork Company (pp. 198–215).
12. Answer of Certain-teed Products Corporation (pp. 216–228).
13. Supplemental Answer of Certain-teed Products Corp. (pp. 229–234).
14. Answer of defendant National Gypsum Company (pp. 235–243).
15. Supplemental Answer of National Gypsum Company (pp. 244–246).
16. Answer of Dant & Russell, Inc. (pp. 247–252).
17. Answer of Wood Conversion Company (pp. 253–268).
18. Answer of Insulite Company (pp. 269–279).
19. Supplemental Pleading for the United States in the Nature of a Reply to the Supplemental Answer of Defendant Masonite Corporation (pp. 280–285).
20. Stipulation Concerning the Effect of Plaintiff's Reply to the Supplemental Answer of the Defendant Masonite Corporation (pp. 286–287).
21. Stipulation of Facts (pp. 288–329).
22. Exhibits attached to the Stipulation—S–2 to S–13 incl. (pp. 330–343).
23. Exhibits S–18 to S–22 (A & B) incl. (pp. 344–352).
24. Exhibit S–23—Celotex "Agency Agreement & License Option."
25. Exhibit S–24—Celotex Supplemental Agreement.
26. Exhibit S–26 (pp. 353–354).
27. Exhibit S–29 (pp. 355–356).
28. Exhibit S–30—Masonite agreement with National Gypsum.
29. Exhibit S–32—Supplemental Agreement—Johns-Manville and Masonite.
30. Exhibit S–34—Supp. Agreement—Armstrong Cork and Masonite.
31. Exhibit S–39—Supplemental Agreement—Wood Conversion Company and Masonite.
32. Exhibit S–41—Supplemental Agreement—Insulite and Masonite.

1106 33. Exhibit S–42–Supplemental Agreement—Insulite and Masonite.

34. Exhibit S–43—Export Agreement Insulite and Masonite.
35. Exhibit S–44—Masonite Agreement with Celotex.
36. Exhibit S–45—Supplemental Agreement between Celotex et al.
37. Exhibit S–46—Masonite Agreement with Flintkote.
38. Exhibit S–48—Modification of Agreement of February 2, 1935, Masonite–Insulite.

39. Exhibits S–49 and S–50—Letters re "shorts."
40. Exhibit S–51—New Agency Agreements.
41. Exhibits S–52 and S–53A and S–53B (pp. 357–362).
42. Exhibit S–54 (p. 363).
43. Exhibit S–56 (p. 364).
44. Plaintiff's Exhibit 28—(Annual Footage Sales of Hardboard Products by the Insulite Company).
45. Exhibits S–58 and S–59 (pp. 366–369).
46. Exhibit S–62 (pp. 370–372).
47. Transcript of Record and Proceedings before Alfred C. Coxe, United District Judge, April 23, 24, 25, 28, 29, 30, May 1 (pp. 373–942).
48. Plaintiff's Exhibits 1–10 incl.; 13–20 incl.; 23–25 incl. (pp. 943–964; 968–980; 981–995).
49. Plaintiff's Exhibit 29—Masonite Domestic Sales—Hardboard products for the eight fiscal years ended October 31, 1938, to 1940, incl., by Masonite Corp.
50. Plaintiff's Exhibit 30—Letter of October 16, 1936, of Masonite to Harris Trust and Savings Bank delivering to Harris Trust in escrow Del Credere Factor's Agreement between Masonite and Armstrong-Newport Company and supplemental letter from Masonite to Armstrong-Newport Company.
51. Plaintiff's Exhibit 33—Letter of March 28, 1934—Alexander to Harvey.
52. Defendants' Exhibits O to R incl. (pp. 996–1014 incl.).
53. Defendants' Exhibit U—Label.
54. Defendants' Exhibit V—Label.
1107 55. Exhibit SS–4—Chart showing breakdown of Masonite's Hardboard Sales by Outlets, 1927–1940.
56. Exhibit SS–5—Chart showing domestic sales of Hardboard through all outlets by product classes, 1927–1940.
57. Exhibit SS–7—Analysis of net graded production of Hardboard.
58. Exhibit SS–14—Excerpts from Standard Specifications for Temporary Housing, War Department, Office of the Quartermaster General.
59. Exhibit SS–16—Summary of Insulation and Hardboard Sales, 1933.
60. Exhibit SS–17—Summary of Insulation and Hardboard Sales, 1936.
61. Exhibit SS–18—Summary of Insulation and Hardboard Sales, 1940.
62. Exhibit SS–19—Summary of Annual Sales of Insulation Board as reported by members of the Insulation Board Institute, 1929–1939.

63. Plaintiff's Motion to Strike Portions of Narrative Statement of Testimony Filed by Certain Defendants, dated May 1, 1941 (p. 1015).
64. Opinion of Coxe, J., dated August 6, 1941 (pp. 1016–1023).
65. Plaintiff's Objections to Proposed Findings of Fact and Conclusions of Law as Modified, Proposed by the Defendants for Adoption by the Court, and a Request for Supplemental Findings of Fact, dated September 25, 1941 (pp. 1024–1047).
66. Findings of Fact and Conclusions of Law filed September 27, 1941 (pp. 1048–1069).
67. Final Judgment (p. 1070).
68. Petition for Appeal (pp. 1071–1072).
69. Assignment of Errors and Prayer for Reversal (pp. 1073–1084).
70. Notice of Appeal (p. 1085).
71. Order Allowing Appeal (p. 1086).
72. Praecipe (pp. 1–3).
73. Stipulation as to Transmitting Original Documents and Exhibit A attached thereto (pp. 1087–1096).
1108 74. Application for Order Approving Stipulation as to Transmitting Original Documents (p. 1097).
75. Order Approving Stipulation as to Transmitting Original Documents (p. 1098).
76. Stipulation Concerning the Transcript of Record (p. 1102).

CHARLES FAHY,
Acting Solicitor General.
HUGH B. COX,
Special Assistant to the Attorney General.
JAMES C. WILSON,
Special Assistant to the Attorney General.
For the United States of America.

This day of , 1941.

1109 Service of the foregoing Statement of Points to be Relied Upon, Designation of Parts of the Record Necessary for Consideration Thereof, and receipt of a copy thereof are hereby acknowledged this 6th day of November 1941.

CHARLES H. TUTTLE,
Charles H. Tuttle,
On behalf of Attorneys for Appellees.

1112 In the Supreme Court of the United States

Stipulation designating United States Letter Patent No. 1,663,505 to be printed as part of the record on appeal

Filed Dec. 11, 1941

It is hereby stipulated and agreed by and between counsel for the appellant and counsel for the appellees that United States Letter Patent No. 1,663,505, Ex. S–1, transmitted to the Supreme Court of the United States as an original document, be and hereby is designated to be printed as part of the record on appeal.

It is further stipulated and agreed by and between the parties hereto that United States Letter Patent No. 1,663,505, Ex. S–1, shall be and hereby is designated to be printed following Item 21, Stipulation of Facts, and before Item 22, Exhibits attached
1113 to the Stipulation, S–2 to S–3 inc., in the Designation of Parts of the Record.

CHARLES FAHY,
Charley Fahy,
Solicitor General,

HUGH B. COX,
Hugh B. Cox,
Special Assistant to the Attorney General,

SAMUEL S. ISSEKS,
Samuel S. Isseks,
Special Assistant to the Attorney General,
For the United States of America, Appellant.

CHARLES H. TUTTLE,
Charles H. Tuttle,
On behalf of Attorneys for Defendants-Appellees.

This 5 day of December 1941.

[Endorsement on cover:] File No. 46051. S. NEW YORK, D. C. U. S. Term No. 723. The United States of America, Appellant vs. The Masonite Corporation, Celotex Corporation, Certain-Teed Products, et al. Filed October 30, 1941. Term No. 723 O. T. 1941.

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